

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 108

INTERSTATE COMMERCE COMMISSION, APPELLANT

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, ET AL.

No. 109

SEA-LAND SERVICE, INC., APPELLANT

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, ET AL.

No. 110

SEATRAN LINES, INC., APPELLANT

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, ET AL.

No. 125

UNITED STATES, APPELLANT

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

NOS. 108, 109 AND 110. FILED MAY 8, 1962

NO. 125. FILED MAY 16, 1962

PROBABLE JURISDICTION NOTED OCTOBER 8, 1962

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Also for the convenience of the Court and the parties the Railroads have printed in this Appendix the provisions of the statutes which are discussed in the several documents above listed. Other statutory provisions, particularly applicable to this litigation, have also been printed in this Appendix.

When any of the materials contained in this Appendix are referred to in the Brief, the page reference in this Appendix is preceded by the letter "A". Thus, a reference to Page 25 of this Appendix is designated "A. 25".

Since this Appendix has been circulated to all parties in this litigation well in advance of the circulation of the Railroads' Brief, it is hoped that such parties when referring to any of the documents in this Appendix will use the same designation. If this is done, the proceedings before this Court will be greatly simplified.

~~H~~~~THE SIX REPORTS AND ORDERS~~

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. M-10415¹

COMMODITIES—PAN-ATLANTIC STEAMSHIP CORPORATION

Decided December 19, 1960.

1. In I. & S. Nos. 6906 and M-11375, and embraced proceedings, and upon reconsideration in I. & S. No. M-10415 and embraced proceedings, sea-land local and joint single-factor through rates on numerous com-

1. In addition to the above-entitled proceeding and 23 others embraced therewith, listed in footnote 1 of the prior report, 309 I. C. C. 587, which are here reconsidered, this report also embraces 19 other proceedings initially decided herein following oral hearing on three separate records, namely:

I. & S. No. 6834, Piggy-Back Rates—Between East and Texas, and the following embraced proceedings: No. 32513, Commodities—Pan-Atlantic—Between East and Texas, and Fourth Section Application No. 34227, Trailer-on-Flat-Car Service Between Official Territory and Dallas-Fort Worth, Tex.

I. & S. No. 6906, Commodities Via Pan-Atlantic Between Texas, Louisiana, and Florida, and embraced proceedings: I. & S. No. 6918, Bags and Boxes—New Orleans, La., to Fla., I. & S. No. M-11051, Clay and Rosin—South to East, I. & S. No. M-11034, Canned Goods—Fort Pierce, Fla., to Brewster, N. Y., I. & S. No. 6932, Petroleum Products—Baton Rouge to Miami, I. & S. No. M-11264, Various Commodities—Pan-Atlantic Steamship Corporation, I. & S. No. M-11259, Pan-Atlantic Steamship—Between East, South, and Southwest, I. & S. No. M-11077, Commodities Via Pan-Atlantic—East to Florida, Louisiana, and Texas, and I. & S. No. M-11361, Canned Goods—Fort Pierce, Fla., to New York, N. Y.

I. & S. No. M-11375, Tires, Chemicals, and Paint Via Pan-Atlantic, and embraced proceedings: I. & S. No. M-11387, Commodities in Motor-Water-Motor Service—N. J. & Pa. to Fla., La., and Tex., I. & S. No. M-11465, Various Commodities—East to South & Southwest, I. & S. No. 6962, Roofing—New Orleans to Tampa, I. & S. No. M-11421, Iron or Steel Castings or Forgings, Houston, Tex., to Buffalo, N. Y., I. & S. No. M-11436, Machinery—New Britain, Conn., to Lubbock, Tex., and I. & S. No. M-11369, Aluminum and Junk, Miss. and Ala. to East.

modities, in trailerload, multiple trailerload, and volume quantities, over single-line routes of Pan-Atlantic Steamship Corporation and joint line routes of motor common carriers and Pan-Atlantic, from, to, and between numerous points in the East, on the one hand, and, on the other, points in the South and Southwest; also from and to points in the South, and between such points, on the one hand, and, on the other, points in the Southwest, found lawful, except as indicated in the report. Prior findings in I. & S. No. M-10415 and embraced proceedings, 309 I. C. C. 587, affirmed. The excepted rates ordered canceled.

2. In No. 32313, sea-land rates, except a rate of Pan-Atlantic, and rail-water-rail rates of Seatrail Lines, Inc., on numerous commodities over water-rail routes from origins in the East to Dallas and Fort Worth, Tex., found not shown to be unlawful. Unlawful rate ordered canceled.
3. In I. & S. No. 6834, proposed reduced trailer-on-flatcar rates on numerous commodities between points in official territory, on the one hand, and on the other, Dallas and Fort Worth, found unjust and unreasonable; and, in Fourth Section Application No. 34227, authority to establish and maintain the proposed trailer-on-flatcar rates without observing the long-and-short-haul provisions of section 4 of the Interstate Commerce Act, denied. Proposed schedules ordered canceled, without prejudice to the filing of new schedules in conformity with findings made.

4. Proceedings discontinued.

Appearances as shown in 309 I. C. C. 587, and in addition:

John P. Ganly for rail-carrier respondents in I. & S. No. 6834, applicants in F. S. A. No. 34227, and interveners in opposition in No. 32313.

A. J. Bordelon for protestant railroads in I. & S. No. 6906 and embraced proceedings, and *Toll R. Ware* for protestant railroads in I. & S. No. M-11375 and embraced proceedings.

Ernest M. Sharp for the Houston Port Bureau, Inc., *Arthur L. Winn, Jr.*, *Samuel Moerman*, and *Walter J. Myskowski* for the Port of New York Authority, *James J. Fisher*, Port Agent for the City of Providence, and *Louis A. Schwartz* for the New Orleans Traffic and Transportation Bureau, protestants in I. & S. No. 6834 and F. S. A. No. 34227, and interveners in support of respondent Pan-Atlantic Steamship Corporation in No. 32313.

Report of the Commission on Reconsideration

BY THE COMMISSION:

These proceedings are related and will be disposed of in one report. It was agreed by the parties that all of the evidence in I. & S. No. M-10415 and proceedings embraced therein could be referred to in the other proceedings and, to the extent relevant, would be competent evidence therein. As indicated in footnote 1, 43 separate proceedings are embraced herein. The title case and the 23 proceedings embraced therewith were the subject of a prior report, 309 I. C. C. 587, which is here being reconsidered. The other 19 proceedings were the subject of three separate reports proposed by the examiner in I. & S. Nos. M-11375, 6834, and 6906, and embraced proceedings.

Exceptions to the proposed reports and replies thereto were filed by the respondents and the protestants. The issues have been orally argued before us. Our conclusions differ in part from those proposed. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

The issues presented are the justness and reasonableness of several sets of rates² involving different modes of transportation, namely, (1) certain reduced so-called sea-land rates of the Pan-Atlantic Steamship Corporation³ and the motor common-carrier participants in its tariffs; (2) numerous rail-water-rail rates of Seatrain Lines, Inc.; and (3) numerous proposed reduced rail trailer-on-flatcar rates, hereinafter called TOFC rates, which reflect substantial parity with the sea-land and Seatrain rates and which the railroads claim are necessary for them to compete for this traffic. The most important question before us here is whether, in attempting to meet the competition of Pan-Atlantic and Seatrain, the railroads may establish compensatory rates which are on a parity with the rates of those competitors, or whether the rate-making provisions of the Interstate Commerce Act, interpreted in the light of the national transportation policy, under the facts here presented, require that the rail rates on this traffic be maintained differentially higher than the rates of those competing modes.

The prior report in I. & S. No. M-10415 and embraced proceedings sets forth the history and description of the sea-land service of Pan-Atlantic, its advantages and disadvantages, rationale of the cost evidence, and other background material. A clear understanding of the related issues in these proceedings requires first a summarization of this evidence, after which we shall direct our attention to the issues and contentions of the parties in these proceedings.

The sea-land service of Pan-Atlantic in conjunction with certificated motor carriers, and by the use of its own motor equipment, moves merchandise freight in highway containers over motor-water-motor routes between the East, on the one hand, and the South and Southwest, on the other, and also between the Southwest and the South. The freight is moved from the shippers' docks over the highways in

2. Rates and costs are stated per 100 pounds, except as otherwise indicated.

3. Name changed to Sea-Land Service, Incorporated, on April 1, 1960.

demountable highway containers to the port and thence lifted onto Pan-Atlantic ships for movement to the destination ports. At the destination ports the containers, with the freight intact, are lifted off the ships and onto highway trailers for delivery to the consignees' docks. This service is closely akin to railroad trailer-on-flatcar service with the substitution of the deck or the hold of a vessel for the rail flatcar.

Prior to the institution of sea-land service Pan-Atlantic engaged in break-bulk water service, which also provided joint routes with motor common carriers and door-to-door service from consignor to consignee. In the prior break-bulk service longshoremen handled the lading into and out of the ships, whereas in sea-land service the containers with the lading are lifted on and off the ships by the use of two gantry-type cranes on each vessel. Each crane is capable of unloading one trailer and placing another on board ship in about five minutes. These patented cranes are part of the ships, and eliminate the need for costly shore installations. The cranes make it possible to serve any port having adequate water and dockside aprons large enough to permit bringing a truck chassis alongside the vessels. Compared with the slower and more expensive break-bulk service, sea-land has reduced considerably Pan-Atlantic's costs, the cargo-handling time, the in-port vessel time, and its loss, damage, and pilferage expenses.

Whether the containers are loaded or empty, a full complement of 226 containers is carried on each voyage. To achieve the proper balance of the cargo, it is necessary that there be a systemized sequence of loading the trailer bodies. For this purpose, many of the outbound containers are assembled at a parking lot near the port at least 60 hours in advance of the vessel's arrival, and the bulk of the cargo must be delivered to shipside parking lots at least 12 hours before the arrival of the ship. The proper sequence of loading affects the trim of the vessel, the list of the vessel during and upon completion of loading, and the degree of roll and

stability. In addition, certain types of containers must be stowed in a limited number of positions only, depending upon the weight, the container construction, the cargo carried, and the destination. One truck breakdown en route to the parking lot from a pickup point could destroy the entire planned loading sequence for any one hatch. Generally, Pan-Atlantic cannot accept sea-land freight and load it on a ship the same day.

Both single-line and joint-line sea-land services are provided by Pan-Atlantic. It operates single line between ports and port terminal areas which it is authorized to serve, by use of its trailerships on the water and leased tractors and trailers on the land. In some instances Pan-Atlantic has operated single line as far as 60 miles beyond a port; its performance of such extensive "terminal" service was found to be without appropriate authority in *Central Truck Lines, Inc. v. Pan-Atlantic S. S. Corp.*, 82 M. C. C. 395.

The joint-line sea-land service of Pan-Atlantic extends well beyond the ports and port terminal areas. For example, electrical appliances may move joint-line motor-water-motor, from Somersworth, N. H., via the ports of New York (Port Newark, N. J.) and Houston to Dallas, Tex.

Presently, Pan-Atlantic is a wholly-owned subsidiary of McLean Industries, Inc. The total investment in the new type sea-land operations made by McLean, or its subsidiaries or affiliates, aggregate between \$40 and \$45 million, of which about 50 percent was used for conversion of break-bulk type vessels to sea-land vessels, over \$20 million for automotive equipment, and about \$500,000 for procurement of terminal facilities, including docks, piers, staging areas, and warehouses.

Beginning in 1933, Pan-Atlantic operated as a conventional break-bulk carrier, except during the World War II years. In May 1957, it suspended its Atlantic-Gulf coastwise break-bulk service to provide vessels for conversion into trailerships. For its sea-land service in the Atlantic-Gulf coastwise trade, it converted four vessels into trailerships,

each with a capacity of 4,000 tons of payload freight, and each holding 226 containers, of which 166 are stowed below deck and 60 on deck. The ships are 468 feet long and capable of a speed of about 15.5 knots, substantially the same as when the ships were used in the break-bulk service.

Prior to World War II there were about 19 deepwater common carriers operating in the Atlantic-Gulf coastwise trade, employing about 139 vessels. In 1940, these water carriers transported more than 8,500,000 tons of cargo. Today, only two carriers are in this trade: namely, Seatrain and Pan-Atlantic, operating, respectively, six and four vessels. A comparison made by Pan-Atlantic shows that between 1939 and 1956, inclusive, the tonnage handled by class I railroads in the United States increased 160.5 percent, and the tonnage handled by class I motor carriers increased 545.6 percent. Excluding bulk oil carried by Seatrain and Pan-Atlantic, the tonnage handled by water carriers in the Atlantic-Gulf coastwise trade during that period declined 79 percent.

Since World War II there has been a substantial expansion of commerce in the United States, particularly in the South and Southwest. An exception to the general growth of transportation has been the Atlantic-Gulf coastwise dry-cargo tonnage of the water service. Pan-Atlantic estimates that Seatrain operating at full capacity could transport about 1 million net tons annually, and that Pan-Atlantic could transport about 800,000 net tons per year (100 round-trip voyages with full loads of 4,000 tons in each direction). The total for the two water carriers would thus be 1,800,000 net tons, compared with over 8,500,000 net tons transported prewar by the water carriers in the same trade. Excluding bulk petroleum carried in tankers, Pan-Atlantic carried in excess of 1 million tons in its coastwise break-bulk service in 1950. In 1956 and 1957, it carried in coastwise service only 433,915 and 332,057 tons, respectively.

Traditionally, water rates, including water-rail and water-motor rates, have been maintained at levels differen-

tially lower than the corresponding all-rail rates, principally because of disadvantages in the water service due to, perils of the sea, slower transit time, and infrequency of sailings. The last major proceeding in which the rates of the Atlantic-Gulf coastwise water carriers were considered was *Class Rate Investigation, 1939*, 286 I. C. C. 5 (docket No. 28300—1952). Therein, we prescribed reasonable maximum first-class rates on ocean-rail traffic, and also reasonable percentage relations of the lower classes to first class, between North Atlantic ports and interior points in eastern seaboard territory, on the one hand, and, on the other, New Orleans and Baton Rouge, La., Texas Gulf ports, and interior points in the Southwest. Those class rates were designed to preserve the then-existing differentials of the ocean-rail rates under the all-rail rates.

The prescribed rates in No. 28300 were class rates, whereas in the instant proceedings only commodity rates are in issue. When it inaugurated the sea-land service, Pan-Atlantic evaluated the rate structures of the existing water and overland carriers and concluded that its sea-land service needed rate differentials under all-rail rates, but that lesser differentials would suffice than those maintained under its previous break-bulk service.

For its trailership service, Pan-Atlantic first put into effect class rates, and later commodity rates. Generally, the class rates were protested, but were not suspended and became effective. Many of the commodity rates were suspended and are under investigation in these and other proceedings. The class-rate structure, established by Pan-Atlantic varies depending upon origins and destinations, the direction of the competing rail ratemaking routes, the constructive water mileages, and the prescribed maximum ocean-rail rates, among other factors. Generally, its trailership class rates are on the basis of 92.5 percent of the overland-carrier rates on terminal (port) to terminal (port) traffic, and on the basis of 95 percent of the overland rates

on traffic moving from, to, or between interior points located beyond the terminals (ports).

The commodity rates for its trailership service in general were related percentagewise to the all-rail commodity rates in the same measure as the sea-land class rates are related to the all-rail class rates. As there are exceptions to the 92.5-95 percent formula in the class-rate structure, so also there are numerous exceptions to that formula for commodity rates. Individual adjustments are made in the latter rates because of varying competition with all-rail carriers, all-motor common carriers, Seatrain, a barge line, and exempt motor carriers. Also, there are instances where the sea-land rates were designed to preserve competitive relations between shippers located at different origins. The result is a wide fluctuation in the differentials between the sea-land rates and the all-rail commodity rates.

Pan-Atlantic contends that the primary accomplishment of its sea-land trailership service lies in the reduction of its internal operating expenses, rather than in any substantial improvement in the value of its service to the public. The expenses in the present sea-land trailership operation are from \$10 to \$12 per cargo ton less than those incurred in the previous break-bulk type of operation. This reduction in expense is mainly a result of the reduction in cargo-handling time and in port vessel time. On the other hand, the rail and motor carriers generally contend that there has been a substantial change in the character of Pan-Atlantic's service from the old break-bulk service to the new trailership service, and particularly in its value to the shipping public. Pan-Atlantic's own literature and public advertisements represent that its trailership service will save transportation costs, avoid delays, prevent damage, and accomplish a reduction in loss, damage, and pilferage.

The views of the shippers on the comparative value of sea-land service to rail service were many and varied, according to their individual transportation problems. Door-to-door service is an important consideration to many ship-

pers. In sea-land service, the lading often moves in a sealed trailer from the door of the consignor to the door of the consignee without being handled en route. Where a shipper or consignee does not have a private or assigned rail siding, the sea-land service has a distinct advantage over rail service, the same as all-motor service. Thus, some New York City consignees do not have private or assigned sidings, which makes drayage necessary when using all-rail service. A survey made by Pan-Atlantic showed that out of 2,350 of its potential shippers and consignees, 1,805, or about 77 per cent, had private rail sidings, while 545 were either not located on rail sidings or were served by team tracks.

Among other factors considered by the shippers in determining the value of the respective services are time in transit, frequency of service, costs of loading and unloading, cost of blocking, dunnage, and bracing, loss or damage, and the availability of stop-off privileges. The testimony of the shippers on these value-of-service factors is recounted in detail in the prior report. Generally, their testimony was inconclusive and failed to show whether the water-carrier's service or the railcarriers' service is more valuable to the shippers by reason of these compared factors.

The most important, and usually the determinative, factor to the shippers as a whole is the measure of the rates. Most of the shippers would not use sea-land service at rates equal to or higher than all-rail or all-motor rates. A number of shippers also would not use sea-land service at rates higher than those of Seatrain. Some shippers who would not use sea-land service if Pan-Atlantic's rates were equal to the rail rates, also would not offer any of their traffic now moving by sea-land service to the railroads if the rail rates are maintained at the present differentials over sea-land rates. Certain other shippers would not use all-rail service even at differentials under all-motor or sea-land rates. Price competition in the sale of some commodities is so keen that the shippers thereof cannot pay a transportation premium for one mode of service as against another.

As indicated, the proceedings herein were heard on four separate records under the lead docket numbers, I. & S. Nos. M-10415, 6834, 6906, and M-11375, and for convenience of further discussion the other pertinent facts and contentions of the parties are hereinafter discussed under those respective numbers.

The reduced sea-land rates of Pan-Atlantic and the rail-water-rail rates of Seatrain here under investigation have become effective; the effective date of the proposed reduced TOFC rates has been voluntarily postponed by the rail carriers. For convenience, the rates under investigation will sometimes be referred to as the proposed rates.

I. & S. No. M-10415.

In the prior report in these proceedings, division 3 considered the lawfulness of approximately 469 proposed reduced commodity rates of Pan-Atlantic and the motor common-carrier participants in its tariffs for the transportation in sea-land service of numerous commodities in trailerload, multiple trailerload, and volume quantities from, to, and between numerous points in the East, South, and Southwest.

Generally, the proposed sea-land rates are lower than the all-rail boxcar rates. In a few instances, for example where there are several rates and minima on a commodity, the all-rail rates are lower than the proposed sea-land rates at the higher minima. Certain of the proposed sea-land rates are listed in appendix A to the prior report, together with the sea-land costs and corresponding all-rail rates and costs. The sea-land costs are broken down between the Pan-Atlantic portion and the motor-carrier portion. Also shown in that appendix are representative examples of the ratios of the sea-land rates to the sea-land costs, and the ratios of the sea-land costs to all-rail costs. The costs shown in that appendix are those obtained from a restatement of the sea-land costs by our Cost Finding Section. The detailed rationale of the restatement is found in appendix B to the prior report.

Of the 489 rates listed, including 20 rates cancelled under special permission, 13 failed to yield out-of-pocket cost, and 145, or about 30 percent, failed to yield fully-distributed cost. In the circumstances presented, division 3 concluded that a lawful rate need not necessarily yield fully-distributed cost. Some of the sea-land rates are more than double the out-of-pocket costs and nearly double the fully-distributed costs. Other sea-land rates exceed the costs by narrower margins. Of the 13 rates which failed to cover out-of-pocket costs, two were cancelled under special permission.

In the prior report, division 3 found the proposed reduced sea-land rates of Pan-Atlantic not unlawful, except 11 rates on the commodities and from and to the points shown in the footnote below,⁴ which failed to cover out-of-pocket costs. The latter rates were found not shown to be just and reasonable, and ordered canceled.

Upon petition of the railroad protestants, to which the respondents replied, we reopened the proceedings for reconsideration on the present record. The rail protestants do not seek reversal of the prior finding that, with the exceptions noted, the proposed sea-land rates are not unlawful. They do not question that finding. Their request for reconsideration is based upon the ground that the division strongly inferred in its report that in its consideration of any future rail-rate adjustments on this traffic, it would disapprove rail rates that would eliminate rate differentials in favor of sea-land. The protestants admit that no differentials or rate relationships which would prevent the adjustment of rail rates in the future were prescribed, but they object to the following paragraph on page 606 of the prior report:

4. Shipping carriers (empty barrels and bottles) from Daytona Beach, Fla., to Philadelphia, Pa.; canned goods from New Orleans, La., to Baltimore, Md., and Rochester, N. Y.; from Gulfport, Miss., to Philadelphia, and from St. Francesville, La., to Miami, Fla.; pulpboard from Bogalusa, La., to New York, N. Y., and from Kreole, Miss., to New York and New Brunswick and Wharton, N. J.; and synthetic plastics from Baton Rouge, La., to Baltimore and Rome, N. Y.

There is indication that if the proposed rates are approved, the all-rail carriers intend to counter with reduced rates of their own. In such event, they should take into account the effect thereof upon the national transportation system and the implications of the national transportation policy, consideration of which is required by the established rules of ratemaking.

The railroads also object to the conclusion on page 605 that "the evidence indicates that the sea-land service generally must have rates lower than those by rail in order to attract any substantial volume of this traffic." They argue that this conclusion rests solely upon the unsupported belief that sea-land is an inferior service and that it must be protected from the price competition of the railroads. These protestants request that the report be so modified as to make clear that the approval of any of the sea-land rates does not constitute a prescription or approval of differentials in favor of sea-land rates compared with rail boxcar rates.

The prior report is criticized also by the railroads for its failure to adopt the examiner's conclusion that, comparing the rail boxcar service with the sea-land service, the cost studies indicate that the railroads are generally the lower-cost agency. In this connection, the division, while accepting the Cost Finding Section's restated costs, stated at page 605:

. . . we do not have before us either the rail or sea-land costs as to many of these rates, and there is a complete absence of any all-motor costs. Moreover, as above discussed, other considerations enter into the factor of inherent advantages. For these reasons, we cannot determine on this record where the inherent advantages may lie as to each commodity, and still less as to each particular rate.

The foregoing conclusion of the division was based primarily on the fact that the all-rail costs submitted by the railroads dealt with 268 movements whereas 469 sea-land

rates are involved. Either rail class or commodity rates are published from and to all of these points.

The ultimate conclusion of the Cost Finding Section as to the lower-cost agency was included in the examiner's proposed report, but was omitted in the division's report. The parties stipulated that the several cost studies could be referred to the Cost Finding Section for analysis. Since that section has been cast in the role of an expert witness, its conclusion in the analysis should have been included in the report. That conclusion is that a comparison of the sea-land costs with the all-rail costs of record shows that for most of the movements where rail costs are shown the sea-land costs exceed the all-rail costs of boxcar service, and that this latter relationship is more pronounced at high minimum weights. We have considered the Cost Finding Section's conclusion along with other facts of record in reaching our conclusions herein.

Our disposition of the other arguments and contentions in the rail carriers' petition for reconsideration is reflected in the findings hereinafter made.

I. & S. No. 6834.

By schedules filed to become effective on November 14, 1957, and later, in I. & S. No. 6834, the rail-carrier respondents proposed to establish new reduced rates listed in 27 tariff items on numerous commodities in TOFC service between ⁵ points in the East, on the one hand, and, on the other, Dallas and Fort Worth. Upon protests thereto, the operation of the schedules was suspended to and including June 13, 1958. The effective date of the schedules has been postponed voluntarily by the respondents.

In Fourth-Section Application No. 34227, the respondent rail carriers seek authority to establish and maintain

5. With one exception, the proposed rates are southbound from points in the East to Dallas and Fort Worth. There is one northbound rate on bags, cotton, new or old, from Dallas and Fort Worth to Baltimore, Md. This northbound rate also applies from and to other points taking the same rates, as provided in the tariff.

the above-mentioned TOFC rates without observing the long-and-short-haul provisions of section 4 of the act. The carriers propose to continue to maintain certain higher rates to and from intermediate origins and destinations. The proposed rates and the application for fourth-section relief in connection therewith are opposed by the Secretary of Agriculture of the United States, Pan-Atlantic, Seatrain, The Eastern Central Motor Carriers Association, Inc. (called Eastern Central), the Houston Port Bureau, Inc., the Port of New York Authority, the City of Providence, and the New Orleans Traffic and Transportation Bureau. No shippers or receivers located at the intermediate points oppose the granting of fourth-section relief.

In No. 32313, by order dated November 8, 1957, an investigation was instituted into effective rates of Pan-Atlantic listed in 22 tariff items in connection with its sea-land service on numerous commodities from origins in the East to Dallas and Fort Worth. By first supplemental order dated December 18, 1957, the investigation was broadened to include certain effective rates of Seatrain in connection with its rail-water-rail service from eastern origins to Dallas and Fort Worth. The sea-land and Seatrain rates are opposed by the rail carriers and by Eastern Central.

The proposed TOFC rates are on a parity with the present sea-land rates, and are substantially the same as the Seatrain rates. Since the railroads are parties to the Seatrain rates to the extent that such rates apply from inland points, technically the railroads are respondents in No. 32313, but they are not defending the Seatrain rates.

The background of the TOFC and other rates.—The railroads published the proposed TOFC rates on a parity with the current rates for the sea-land service upon the assumption that these two operations, which have many of the characteristics of overland motor-carrier service, are equivalents from a quality standpoint, and that therefore, in the absence of special circumstances, they should be

priced at the same levels. Generally, as stated, Pan-Atlantic and Seatrain contend that the water-carrier services are entitled to rates differentially lower than the rates of the overland carriers. Eastern Central takes the position that TOFC rates generally should be continued on the level of the motor common-carrier rates, and that if TOFC rates are reduced the motor-carrier rates also will have to be reduced. It urges that the railroads in their proposed TOFC service may not find it necessary to meet the exact Pan-Atlantic rates, and that the record may warrant a differential of the Pan-Atlantic rates under the TOFC rates, which it believes, however, should be less than the differentials presently maintained.

Rail TOFC service between points in the Southwest and points in the western part of official territory, including Pittsburgh, Pa., was inaugurated on June 13, 1956. Later, on September 8, 1956, the official-territory origins were extended to include points east of Pittsburgh. For this service, rates were published generally on a parity with the prevailing motor-carrier rates. When Pan-Atlantic inaugurated its sea-land service between the Southwest and the East in the fall of 1957, the railroads were convinced that they could not compete without a reduction in their TOFC rates. They decided to publish TOFC rates on the same level as the sea-land rates, but not between all origins and destinations. It was their intention to publish the TOFC rates herein from selected points in official territory to Dallas and Fort Worth as a limited pilot or trial effort to meet the sea-land rates. A wholesale reduction in the TOFC rates would have disturbed competitive patterns between the railroads and the motor common carriers, and also would have created competition among the rail services, because the TOFC rates on the sea-land basis in many instances would have been lower than the all-rail boxcar rates.

Since the proposed TOFC rates were made applicable only to the destinations of Dallas and Fort Worth, they would result in fourth-section departures. Avoidance of

these departures would have entailed substantial reductions in rail revenues at intermediate points well outside the sphere affected by the sea-land competition. There is such competition at Dallas and Fort Worth.

The general rate situation among the various carriers herein is illustrated by the rates on candy and confectionery. For example, from Naugatuck, Conn., to Dallas and Fort Worth, the sea-land rate is 207 cents, minimum 36,000 pounds, and this is also the proposed TOFC rate. The Seatrain rate from and to the same points is 208.25 cents, minimum 65,000 pounds. The present all-rail boxcar rate is 220 cents, minimum 36,000 pounds, and the corresponding all-truck rate in effect prior to December 9, 1957, was 284 cents, minimum 23,000 pounds.

The proposed TOFC rates, in reflecting parity with sea-land rates, at times go below the Seatrain rates. The sea-land rates are not always the same as the Seatrain rates, and there are differences also in the minimum weights. In part, the differences between Seatrain and sea-land rates are caused by the variations in the application of general increases on the single-factor sea-land commodity rates and on the combination rail-water-rail Seatrain rates. Where the Seatrain rates are competitive with the rates of the overland carriers, it is the intention of Pan-Atlantic to eliminate minor differences between its rates and the rates of Seatrain by adjusting the sea-land rates to the level of the Seatrain rates. In those instances where Pan-Atlantic does not consider the Seatrain rates to be competitive with the rates of the overland carriers, it intends to maintain differentials so that the sea-land rates will be about 5 percent under the overland competitive rates.

Sea-land and TOFC costs.—Extensive cost evidence was submitted by the rail carriers and by Pan-Atlantic, and, as requested by the parties, this evidence has also been considered by our Cost Finding Section, which has restated the TOFC costs and the sea-land costs. Representative rates, restated costs, and cost ratios are shown in ap-

pendix A hereto. The rationale of the restatement of the TOFC costs appears in appendix B. The rationale of the restatement of the sea-land costs is the same as that used in connection with I. & S. No. M-10415 et al. (appendix B of the report therein), and will not be repeated here.

The sea-land rates.—The sea-land rates, with one exception, exceed the restated out-of-pocket cost of performing the service, and they range as high as 258 percent of the out-of-pocket costs. The one exception is the rate of 216 cents, minimum 20,000 pounds, on paint and paint materials, from Baltimore to Dallas and Fort Worth, for which the restated out-of-pocket sea-land cost is 214 cents, or 1 cent more than the rate. There is no corresponding proposed TOFC rate, minimum 20,000 pounds. There are under investigation herein both a sea-land and a proposed TOFC rate on paint and certain other commodities from Baltimore of 187 cents, minimum 36,000 pounds, which rate exceeds the out-of-pocket costs by sea-land and by TOFC. Most of the sea-land rates herein also exceed fully-distributed costs.

The restated sea-land costs, both out-of-pocket and fully-distributed, are below the restated TOFC costs for all movements of comparable weight as computed for railroad-owned flat cars having a capacity of a single trailer and equipped with tie-down devices. In connection with flat cars not presently owned but leased by the railroads, designed to hold two trailers with special hold-down devices (called TTX cars), the restated sea-land costs are below the restated TOFC costs for all except two of the 66 movements listed in the restatement. We conclude that, generally, for the movements herein, the costs of record indicate that sea-land is a lower cost service than TOFC.

After inauguration of Pan-Atlantic trailership service to and from Houston, Tex., in October 1957, shipments were made in 1957 in connection with only 13 of the 22 Pan-Atlantic tariff items under investigation herein, and only 15 shipments moved under seven of those 13 items. The record does not disclose the amount of traffic handled at

rates in the other six active items, but on the whole the amount of traffic handled in sea-land service at rates in these 22 items in 1957 after inauguration of the service in October apparently was relatively small. There is no indication that Pan-Atlantic has moved any traffic at rates as high as competing all-rail boxcar or TOFC rates.

The proposed TOFC rates.—As shown in the restatement of costs by the Cost Finding Section, the proposed TOFC rates equal or exceed the restated out-of-pocket TOFC costs computed for hauls with so-called average circuitry (the short-line distance between the origin and the Chicago and East St. Louis, Ill., gateways and between these gateways and the destination, increased by 13 percent as an allowance for average circuitry); for all listed movements by TTX cars; and for all but six of 66 listed movements by railroad-owned cars. The proposed TOFC rates equal or exceed the fully-distributed costs for 43 movements by TTX cars and for 14 movements by railroad-owned cars. More trailers per car are carried on TTX cars than on railroad-owned cars.

The six movements in railroad-owned cars which do not return out-of-pocket costs are electric switch boxes from Newark, N. J. (rate 240 cents, minimum 24,000 pounds, restated out-of-pocket cost 249 cents); foodstuffs from New York, N. Y. (rate 222 cents, minimum 24,000 pounds, out-of-pocket cost 249 cents); laundry sour from Baltimore (rate 169 cents, minimum 36,000 pounds, out-of-pocket cost 172 cents; and rate 195 cents, minimum 24,000 pounds, out-of-pocket cost 236 cents); alcoholic liquors from Baltimore (rate 267 cents, minimum 20,000 pounds, out-of-pocket cost 276 cents); and alcoholic liquors from Philadelphia (rate 280 cents, minimum 20,000 pounds, out-of-pocket cost 283 cents). As we have no way of knowing the percentages of this traffic which would move in railroad-owned cars and in TTX cars, we conclude that the rates for these six movements are not shown to be compensatory.

The Seatrain rates.—The investigation herein of Seatrain rates is limited to those on three groups of commodities, briefly described as linoleum, ammunition, and candy and confectionery. The first commodity group is more generally described as floor coverings or related articles, including carpets, mats, rugs, coverings, and linoleum. The instant rates on linoleum range from 35.5 to 40.6 percent of the No. 28300 first-class rail-water-rail rates. In *William Volker & Co. of Texas, Inc. v. Central R. Co. of Pa.*, 302 U. S. C. 757, the complainants assailed the combination rates on linoleum transported over rail-water or rail-water-rail routes, including rates from and to the origins herein. The assailed rates comprised in most instances the aggregates of intermediate rates, consisting in part of exceptions or commodity-rate factors. These rates produced higher charges than did rates established on the uniform classification basis. We found that for the future those assailed rates were unjust and unreasonable to the extent that they exceeded the contemporaneous uniform classification basis. Rates in conformity with that order, on the basis of 35 percent of first class, were published effective May 15, 1958. These rates, now in effect, are on a basis lower than that reflected by the Seatrain rates on linoleum under investigation herein. Accordingly, this phase of the investigation of Seatrain rates will not be further discussed.

The rates of Seatrain on ammunition here under investigation apply from Edgewater, N. J., to Dallas and Fort Worth on traffic originating at Bridgeport and New Haven, Conn. These proportional rates, when added to the all-rail factors from origin to Edgewater, produce combination rail-water-rail rates to Dallas and Fort Worth of 295 and 300 cents, respectively, minimum 40,000 pounds. These commodity rates alternate with higher rates, minimum 30,000 pounds, not here under investigation, which are based on classification exceptions. The Seatrain commodity combination rates, minimum 40,000 pounds, are re-

lated to the corresponding all-rail commodity rates⁶ by lesser differentials than are the Seatrain exceptions class rates to the corresponding all-rail exceptions class rates. The differential of 70 cents per 100 pounds of the rail-water-rail 30,000-pound rates under the corresponding all-rail rates results from the (exceptions) class rates prescribed or approved in docket No. 13535. The commodity combinations, minimum 40,000 pounds, reflect differentials of 39 cents or 56 percent, and 34 cents or 49 percent, respectively, from Bridgeport and New Haven, of the class-rate differential.

During 1957, Seatrain obtained a total of three carloads of ammunition from Bridgeport to Dallas and Fort Worth, and no movement from New Haven. One of the three shipments moved at the 30,000-pound rate and the other two at the 40,000-pound rate. Under the existing rates, Seatrain participated in only a small portion of the ammunition traffic. Obviously, if the ammunition differentials were replaced by rate equalization, Seatrain's competitive position would be weakened considerably.

The rates of Seatrain on candy and confectionery here considered are from Edgewater to Texas City, Tex., on shipments coming from specified origins in Connecticut, Massachusetts, New Jersey, New York, and Pennsylvania. These proportional rates, when added to the all-rail factors to and from the ports, produce combination rates subject to minimum weights of 50,000 and 65,000 pounds which alternate with certain class rates, minimum 36,000 pounds.

The existing all-rail rates on candy and confectionery are exceptions class rates, minimum 36,000 pounds. They are lower than the rail-water-rail class rates, minimum 36,000 pounds, and also lower than some of the Seatrain commodity combination rates, minimum 50,000 pounds. The Seatrain commodity combination rates, minimum 65,000 pounds, are lower than the existing all-rail exceptions class

6. Reference to all-rail rates means to existing all-rail rates, and does not refer to the proposed TOFC rates.

rates, minimum 36,000 pounds, by 5 cents at Camden, N. J., and Philadelphia, Pa., by 9 cents at Boston, Cambridge, Malden, Mansfield, and Milton, Mass., and Reading, Pa., by 11 cents at Naugatuck, and by 12 cents at Brooklyn, N. Y.

Of the 14 origins for candy herein, in 1957 Seatrain obtained only a total of four carloads, each over 65,000 pounds, from Mansfield. Thus, Seatrain participated in only a very small portion of the candy traffic. Obviously, if the candy differentials favorable to Seatrain were replaced by rate equalization, its competitive position would worsen considerably.

Seatrain costs.—No evidence was introduced by Seatrain or by any of the other parties herein concerning the cost of the Seatrain service or the compensatory nature of its rates. While it was agreed that the annual reports of all parties might be referred to, and materials therefrom used without proof of authenticity, subject to objections as to relevancy and materiality only, no specific reference to the Seatrain reports was made at the hearing. On brief, Seatrain states that data embodied in its annual reports clearly show the compensatory nature of its rates under investigation herein. We conclude that the evidence does not warrant a finding that the Seatrain rates are noncompensatory.

The comparative values of the TOFC, sea-land, and Seatrain services.—From the standpoint of the shipper, the TOFC service and the sea-land service are similar in that both provide door-to-door motor-carrier service; that is, the shipment leaves the consignor in a motor-carrier trailer and arrives at the door of the consignee in the same motor-carrier trailer. In TOFC service, the trailer is moved on railroad flat cars, and in sea-land service the trailer body or box is moved on a trailership during the course of the line-haul movement.

Seatrain service is similar to all-rail boxcar service in that the service offers to the shipper the transportation of

his lading in a rail car from consignor to consignee. To the extent that all-rail service has certain service disadvantages, such as in the case of a shipper not located on a private siding, these disadvantages also generally beset the Seatrain service. Seatrain at present offers service between the ports of Edgewater, on the one hand, and, on the other, Belle Chasse, La., and Texas City, using freight cars as containers. Seatrain contemplates the inauguration of a new so-called "seamobile" service, which is to be similar to Pan-Atlantic's sea-land service. Seamobile would use special containers which would be transferred readily between Seatrain vessels and highway trailers or rail cars.

The rail carriers regard Seatrain as offering a lower-quality service than TOFC, and TOFC service as generally of higher quality than all-rail boxcar service. According to them, there is no indication that Seatrain service is of lower quality than all-rail boxcar service.

Generally, all of the parties agree that TOFC is a higher quality service than all-rail boxcar service. A number of shipper witnesses presented by Pan-Atlantic stated that they would not use sea-land service at rates equal to or higher than the all-rail rates. Although this testimony dealt primarily with a comparison of sea-land with rail boxcar service, inasmuch as TOFC is of higher quality than all-rail boxcar service, it follows that the testimony has application also to a comparison of sea-land with TOFC service.

On the other hand, a number of shipper witnesses presented by the rail carriers made statements to the effect that they would not use TOFC service unless the railroads offered piggy-back rates equal to sea-land rates. Some of these shippers would not use carload boxcar service because their customers are not located on rail sidings, whereas sea-land service provided store-door delivery, and these shippers indicate that the railroads must provide TOFC service to compete with the sea-land service. One of these shipper witnesses stated that transit time has never been an important factor to it. Other shippers are concerned with

transit time, and state that between certain points not in issue herein sea-land service has been faster than all-rail boxcar service.

Slower transit time is listed by Pan-Atlantic as one of its service disadvantages in relation to the proposed TOFC service. On four voyages during November and December 1957, the average transit time by sea-land was 13.98 days from eastern origins to Dallas and Fort Worth, and a study made by the rail carriers for all-rail boxcar service showed an average transit time of 10 days from New England to the Southwest and 9 days from trunk-line territory to the Southwest. Generally, so far as this record shows, TOFC service has about the same or one day faster transit time than all-rail boxcar service. For cost purposes, the rail carriers and Pan-Atlantic used TOFC costs for trailer rental based on average round-trip times, respectively, of 13.4 days and 14 days. We conclude that the average one-way TOFC transit time from origin to destination is about 7 days, and that sea-land service is generally slower than TOFC service.

Seatrain lists the same general disadvantages of its service in relation to the proposed TOFC service as were listed by Pan-Atlantic. Seatrain has two weekly sailings from Edgewater to Texas City, and two weekly sailings in the reverse direction. Seatrain time in transit by water between these ports is six days one way, and to this time there must be added from three to five days for the movement from New England or trunk-line territory to Edgewater, and two days for the movement from Texas City to Dallas or Fort Worth. Seatrain transit time is slower than the proposed TOFC service. Seatrain also lists restrictions on the size of cars which its vessels are designed to handle, and the bunching of cars at destination when shipped via Seatrain to a multiple-car consignee, as additional service disadvantages. As stated, it is conceded by the parties that Seatrain offers a lower-quality service than TOFC.

Generally, the rail carriers consider sea-land service to be superior to the Seatrain service. Pan-Atlantic contends

that the railroad position is influenced by the fact that some of the railroads participate in the joint rail-water-rail operations of Seatrain, and that the railroads hope to make sea-land rates noncompetitive with Seatrain, thus forcing Pan-Atlantic out of the Atlantic-Gulf trade. It states that many of the Seatrain rates are maximum rates prescribed for application by Seatrain in No. 28300, and that such rates cannot be condemned for application by Seatrain in the same manner that the railroads are seeking to have them condemned for application via Pan-Atlantic.

Seatrain takes the position that there is nothing of record to justify sea-land rates lower than Seatrain rail-water-rail rates, and that sea-land truck-water-truck rates which are lower than Seatrain rates, either in the measure of the rate or by virtue of lower minimum weights, or both, are unjust, unreasonable, lower than competitively necessary, and therefore injurious to the rate structure and contrary to the national transportation policy. It asks that Pan-Atlantic be ordered to publish and maintain rates and minimum weights no lower than those maintained by and for the account of Seatrain in its rail-water-rail service.

The evidence shows that sea-land and Seatrain services, in so far as the water transportation is concerned, are substantially similar. Both transport cargo in containers on ocean vessels, in one case truck trailers and in the other, rail freight cars. In both, marine insurance is provided by the carriers. Both transport truckload or carload cargo from the consignor to the consignee in a single container without transfer of lading. A difference is that, unless the shippers and consignees are on sidings, door-to-door pickup and delivery cannot be made by rail car as in the case of motor truck-trailers. Uncertainty of ocean transport, infrequency of sailings, and longer transit time than by TOFC, are factors present both in sea-land and Seatrain service.

Many shippers would not use sea-land service unless the sea-land rates were no higher than the Seatrain rates. One shipper at Syracuse, N. Y., whose plant was constructed for rail shipments, would prefer to ship by all-rail or by

Seatrain, rather than by sea-land. At least one shipper would discontinue using Pan-Atlantic's service if the sea-land rates were increased above the Seatrains rates. This shipper and the others supporting Pan-Atlantic make no mention of the minimum weights attached to their sea-land and Seatrains rates, and as between sea-land and Seatrains the record does not justify the prescription of equal minimum weights. Seemingly, the same minima would not be practicable since sea-land shipments use trailer bodies as containers whereas Seatrains shipments move in railroad cars.

It is the position of the water carriers herein that the proposed TOFC rates would precipitate a cycle of destructive competition, contrary to the national transportation policy. Seatrains states that if the TOFC rates are permitted to become effective it will publish immediately rail-water-rail rates reflecting reasonable differentials under the TOFC rates; that Pan-Atlantic could then be expected to publish rates no higher than Seatrains's rates and made differentially under the TOFC rates; and that the net result would be a rate relationship comparable to that now existing but on a substantially depressed basis. It stresses, what appears to us a reasonable conclusion, that the rate-cutting activity probably would not stop even at that destructive level, and that quite certainly a further vicious cycle of rate cutting would ensue.

FOURTH SECTION APPLICATION No. 34227

Fourth Section Application No. 34227 requests authority to maintain the proposed reduced TOFC commodity rates between specified points in eastern territory, on the one hand, and Dallas and Fort Worth, on the other, over the short tariff routes without observing the long-and-short-haul provision of section 4. The rates which would be maintained from and to the higher-rated intermediate points are the present class or combination rates. The following are typical examples of the departures.

From Boston, Mass., to Dallas over the direct route composed of the lines of the Boston and Maine Railroad to

Mechanicsville, N. Y., The Delaware and Hudson Railroad Company to Binghamton, N. Y., the Erie Railroad Company to Huntington, Ind., the Wabash Railroad Company to East St. Louis, Ill., and the Missouri Pacific Railroad Company beyond, the distance is 1,965 miles, and the proposed rate on candy and confectionery is 214 cents. Over this route to Bald Knob, Ark., and Terrel, Tex., 1,543 and 1,930 miles, respectively, rates of 236 and 272 cents will be maintained. From Lancaster, Pa., to Dallas over the direct route composed of the lines of the Pennsylvania Railroad Company to East St. Louis, the Missouri Pacific to Texarkana, Tex., and The Texas and Pacific Railway Company beyond, the distance is 1,591 miles and the proposed rate 204 cents. Over this route to Arkadelphia, Ark., and Terrel, 1,311 and 1,555 miles, respectively, rates of 225 and 253 cents will be maintained.

The examples offered by the applicants indicate that the earnings over the direct routes would range from 21.8 to 31.6 mills a ton-mile, and from 39.2 to 47.4 cents per car-mile based on a single trailer per flat car, and 78.4 to 94.8 cents per car-mile based on two trailers per flat car.

While these earnings and the cost data previously discussed show that the rates generally would be reasonably compensatory, in view of the conclusions reached with respect to the justness and reasonableness of these proposed rates, the application will be denied.

I. & S. No. 6906

By schedules filed to become effective on April 3, 1958, and later, in these proceedings, Pan-Atlantic and the motor common-carrier participants in its tariffs proposed to establish approximately 94 commodity rates for the transportation in sea-land service of numerous commodities,⁷ in trailer-

7. Sewer pipe, paper and paper bags, petroleum products, clay tile, bottle caps, calcium sulphate, iron oxide, titanium, dioxide toilet preparations, glass bottles, laundry soap, red lead, mortar color, printing paper, synthetic plastics, paper fabric bags, paper boxes, clay n.o.i., rosin, canned goods, petroleum, lumber, oak flooring, roofing, ammunition, beer, drain tile, wallboard, and paraffin wax.

load, multiple-trailerload, and volume quantities, from, to, and between numerous points in the East, South, and Southwest. Upon protest of rail carriers in these areas, the operation of the schedules was suspended to and including November 2, 1958, and later, after which the schedules became effective.

The evidence used in computing costs in the instant proceedings is similar to that submitted in I. & S. No. M-10415. Our Cost Finding Section has considered this evidence and has restated the sea-land costs before us. The rationale of the restatement is substantially the same as that in I. & S. No. M-10415. The conclusion is that the proposed rates equal or exceed the out-of-pocket costs for 85 of the listed 94 movements. Representative proposed rates and restated costs are shown in appendix C hereto.

In the restatement of costs, there are nine listed rates which yield less than the out-of-pocket cost. Pan-Atlantic states that it will seek authority to cancel two of these rates, both applying on petroleum products, from New Orleans to Miami and Melbourne, Fla., under investigation in I. & S. No. 6906. Of the remaining seven rates listed in the restatement as not yielding out-of-pocket costs, two are on paper and bags, one on glass bottles, two on synthetic plastics, and two on beer. The rates on paper and bags are from Advance and Hodge, La., to Miami, in I. & S. No. 6906 (109 cents, minimum 64,000 pounds, utilizing two trailers with 32,000 pounds each; out-of-pocket cost, 111 cents); the rate on glass bottles is from Lancaster, N. Y., to Miami, in I. & S. No. M-11077 (184 cents, minimum 22,000 pounds; out-of-pocket cost, 186 cents); the rates on synthetic plastics are from Buffalo, N. Y., to Dallas and Fort Worth, in I. & S. No. M-11077 (195 cents, minimum 30,000 pounds; out-of-pocket costs, 199 and 201 cents, respectively); and the rates on beer are from Philadelphia to Daytona Beach, Fla., in I. & S. No. M-11259 (99 and 85 cents, minima 30,000 and 40,000 pounds, respectively; out-of-pocket costs, 119 and 106 cents).

Only the sea-land rates of Pan-Atlantic, and not the all-rail boxcar rates, are here under investigation. The rail carriers urge that regardless of whether we approve or disapprove the sea-land rates, there should be no prescription of a relationship between the sea-land and the all-rail rates. The rail carriers indicate that if the instant rates are approved, they may counter with reduced rates of their own.

Based on the costs before us, the sea-land rates here in issue generally, with the exception of the nine rates previously noted, are compensatory. The other listed 85 rates exceed out-of-pocket costs, and about 42 percent of them cover fully-distributed costs.

I. & S. No. M-11375

By schedules filed to become effective on June 9, 1958, and later, the respondents, Pan-Atlantic and the motor-carrier participants in its tariffs, proposed to establish 65 or more reduced commodity rates for the transportation in sea-land service of numerous commodities,* in trailerload, multiple-trailerload, and volume quantities, from and to points in the East, South, and Southwest. Upon protests of rail carriers and others, the operation of the schedules was suspended to and including January 8, 1959, in the title proceeding, and later in some of the embraced proceedings, after which dates the schedules became effective.

The proposed rates, with certain exceptions, reflect differentials, approximating 5 percent to and from interior points and 7 percent to and from the ports, under the overland rates of rail or motor carriers. In no instance is Pan-Atlantic participating in traffic in competition with the rail or motor carriers except at rates differentially under the all-rail or all-motor rates. For example, when in 1958

8. Including copper cable, tires, wallboard, woodenware, chemicals, denatured alcohol, paint, floor covering, aluminum foil, glue, insulating material, synthetic plastics, printed matter, skates, iron or steel bars, petroleum oil, building paper, roofing and roofing material, aluminum articles, aluminum junk, iron or steel castings, and machinery.

a differential on canned foodstuffs from Crystal City, Tex., to Swedesboro, N. J., was removed by a reduction in the rail rate, all of the traffic, which had been handled previously by Pan-Atlantic, was diverted to the railroads.

The cost evidence submitted in these proceedings has also been considered by our Cost Finding Section. Appendix D hereto contains examples of the costs of record as restated by that section in accordance with accepted cost-finding principles. The cost evidence shows that none of the sea-land rates in issue are below out-of-pocket cost, and in most instances the rates exceed fully-distributed cost.

In most instances on this traffic, according to the cost data of record, the railroads are the low-cost agency on an out-of-pocket basis, especially where the higher minimum weights are used. For example, on copper cable moving from New Haven, Conn., to Tampa, Fla., when the traffic moves at minimum weights of 30,000 pounds, Pan-Atlantic's restated costs are 97 cents per 100 pounds and the rail restated costs are 101 cents, so that Pan-Atlantic's costs are 96 percent of the rail costs. However, when the 60,000-pound minimum is used, Pan-Atlantic's costs remain at 97 cents because of the necessity of using two trailer boxes, while the rail costs decrease to 67 cents, or a ratio of sea-land to rail of 145 percent. No rail fully-distributed costs are on this record, nor was any attempt made to show all-motor costs.

During September 1958, the Coast Guard reclassified the dead-weight tonnage of the Pan-Atlantic vessels. The tonnage capacity of each vessel was increased by 500 tons, which according to Pan-Atlantic results in a substantial reduction in vessel cost per ton carried. We find that the sea-land rates equal or exceed the out-of-pocket costs for all movements, and are compensatory.

The protestants indicate that if the instant rates are approved, they intend to counter with reduced rates of their own.

SUMMARY AND CONCLUSIONS

The sea-land, Seatrain, and TOFC rates here under investigation, with the few exceptions noted, appear to be compensatory. Many of them are above the fully-distributed costs shown, and, with the exceptions mentioned, all are above the out-of-pocket costs. The next, and the most important, question is whether these rates constitute destructive competition.

As related, the sea-land rates of Pan-Atlantic, in general, are lower than the corresponding rail rates, but by lesser amounts than differentials which existed by reason of the rates formerly maintained in connection with Pan-Atlantic's break-bulk service. At the same time, Pan-Atlantic's costs of the sea-land operation are from \$10 to \$12 a ton less than the cost under its break-bulk service.

Unquestionably, Pan-Atlantic's former break-bulk service was inferior to rail service. While many of the service disadvantages of the former break-bulk operation have been overcome by the sea-land operation, the preponderance of the testimony on these records is to the effect that most of the shippers prefer rail service to sea-land service except at lower rates for the latter. The records show no instance of any traffic moving by sea-land except at rates lower than the rail rates. We must conclude, therefore, that, in order to attract traffic, the sea-land service must establish rates somewhat below those of the rail carriers from and to the same points, and that Seatrain, whose rates and service are comparable to Pan-Atlantic's, is in a like position.

In the prior report in I. & S. No. M-10415 the division concluded that the proposed sea-land rates there under investigation would not be competitively destructive. As explained, the rail carriers do not attack that conclusion in their petition for reconsideration. We agree with the division, and we further conclude that the compensatory sea-land and Seatrain rates under investigation in the other proceedings also are not competitively destructive.

The proposed TOFC rates would be on a parity with the current sea-land rates, and, as indicated, are on the level of the motor common-carrier rates, based on the assumption that the TOFC and sea-land services have many of the characteristics of overland motor service. The motor carriers agree that a differential of sea-land rates under TOFC rates is justified. They are not prepared to suggest what that differential should be.

Pan-Atlantic and Seatrains contend that the proposed TOFC rates are unlawful because they would wipe out existing differentials and place the rail rates on the exact level of the sea-land and Seatrains rates. They insist that they must have rates lower than the rail rates if they are to move any substantial volume of this traffic.

All of Pan-Atlantic's traffic is competitive. On the other hand, Pan-Atlantic argues that the traffic which the railroads seek to retain or obtain in competition with Pan-Atlantic and Seatrains constitutes only a small part of their total traffic in the areas here affected, and that because of the volume of their noncompetitive traffic the railroads could, if permitted to do so, reduce their sea-land competitive rates to an out-of-pocket cost basis and make up most or all of the difference between that level and their fully-distributed costs on other traffic.

Pan-Atlantic, if it is to continue in operation, must recover its fully-distributed costs on the overall sea-land operations. Thus, if the differentially-lower rates which Pan-Atlantic must maintain to attract traffic in competition with the railroads were forced by such competition to be reduced to a point where, in general, they failed to recover operating costs plus a reasonable return, obviously its sea-land operations would become unprofitable and their continuance would be threatened.

Pan-Atlantic insists that under the act, interpreted in the light of the national transportation policy, we are required to prescribe a differential in its favor in order to preserve its operations as an essential part of the national

transportation system. It seeks a minimum differential in its favor of 10 percent under the rail TOFC rates, and concedes that its differential under the rail boxcar rates should be somewhat less. It states that experience has shown, generally speaking, that a 5 percent differential, sea-land under rail boxcar rates, is the minimum that will permit sea-land participation in the traffic.

Seatrain asks that whatever action we may take in prescribing a relation between the sea-land and rail rates, such action be given effect through the medium of a minimum rate order which will preserve the differentials now enjoyed by Seatrain in competition with the railroads.

The restated sea-land costs, both out-of-pocket and fully-distributed, are below the restated TOFC costs for all movements on which the proposed TOFC rates would apply, as computed for flat cars with a single trailer, and also for all but two of the 66 movements computed for two trailers on a TTX car. Comparing the rail boxcar service with sea-land, on some of this traffic, particularly port-to-port traffic and certain other traffic subject to the higher single-trailer minima, Pan-Atlantic is shown as the low-cost agency; on the other traffic, the railroads' costs appear to be lower. No witness hazarded a guess as to the probable division of the TOFC traffic under the proposed rates as between single-trailer and two-trailer movements. The rail costs of transporting TOFC shipments would of course vary considerably depending upon whether a flat car carrying only one trailer or a TTX car carrying two trailers were used; the choice of the equipment used would rest entirely with the railroads. Also, a shift from one port to another by Pan-Atlantic, which is frequently required by the peculiarities of the service, can effect a substantial change in the water-carrier costs on any of this traffic. Moreover, we do not have before us the rail costs as to many of these rates; and, as discussed in detail in the prior report, other considerations enter into the factor of inherent advantages. For the foregoing reasons, we can not determine on these records

where the inherent advantages may lie as to any of the rates in issue. We must recognize, also, that cost is only one of the elements which may appropriately be considered in passing upon the lawfulness of rates. In the exceptional circumstances here presented, other considerations, herein discussed, appear to us determinative of the issues.

In dealing with competitive rates, section 15a(3) prohibits us from holding the rates of a carrier to a particular level to protect the traffic of another mode. That prohibition, however, is qualified by the words "giving due consideration to the objectives of the national transportation policy declared in this Act." Clearly, the prohibition does not mean that rates which fail to meet other standards of lawfulness in the act, interpreted in the light of the national transportation policy, must be approved because an effect of their disapproval might be to protect the traffic of a competing mode. It is the declared national transportation policy, among other things, to provide for fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each, to promote safe, adequate, economical, and efficient service, and foster sound economic conditions in transportation and among the several carriers, *all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.*

Since the enactment of section 15a(3) in 1958, we have had occasion to apply its provisions in a number of situations where rate reductions motivated by intermode competition were under consideration. We have refused to condemn the compensatory rates of carriers even though they were reduced below the prevailing level of the rates of competing modes, in the absence of a showing of unlawfulness under the act. See *Lumber, California and Oregon to California and Arizona*, 308 I. C. C. 345; *Paint and Re-*

lated Articles in Official Territory, 308 I. C. C. 439; *Sugar to Ohio River Crossings*, 308 I. C. C. 167; *Magnesium from Velasco, Tex., to East St. Louis, Ill.*, 309 I. C. C. 659. ~~None~~ None of the prior proceedings, however, presented a situation such as that before us here. The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence, of the coastwise water-carrier industry generally.

The record shows that where there were 19 companies with 139 vessels operating in the Atlantic-Gulf coastwise trade prior to World War II, today only two deep-water common carriers are operating in that trade with seven vessels, three by Pan-Atlantic and four by Seatrain. And where approximately 8.5 million tons annually were transported in the Atlantic-Gulf coastwise trade prior to the war, the present capacity of the remaining vessels in that trade is only 1.8 million tons. In 1959, Pan-Atlantic's total tonnage, coastwise and Puerto Rican trades, approximated 600,000 tons, as compared with over 1,000,000 tons coastwise alone in 1941. At the outset of World War II, all of the vessels employed in the deep-water coastwise trade were taken over by the Federal government for national defense.

The importance of coastwise shipping for national defense purposes has been emphasized repeatedly from various governmental sources. Thus, the United States Maritime Administration in "A Review of the Coastwise and Intercoastal Shipping Trades" published in December 1955, stated, in part:

In short the crux of the coastwise-intercoastal shipping problem is in the break-bulk dry-cargo trade today as it was before the war. The re-establishment and preservation of this segment of the domestic fleet is of vital national defense importance if the immediate needs of a future grave national emergency are to be

met. It is obvious that the ready availability of ships employed in domestic operations may well be a critical factor in any initial military or civil defense operation of the United States occasioned by a future atomic or thermo-nuclear war.

Further, an economically sound, low-cost domestic fleet will continue to make important contributions to the economic growth and development of the United States as a whole and a balanced national transportation system in particular.

In a report on domestic water carriers by the Committee on Interstate and Foreign Commerce of the Senate, entitled "1950 Merchant Marine Study and Investigation," made pursuant to Senate Resolution 50, Report 2494, 81st Congress, 2d Session,⁹ that Committee said, at page 17:

One fact stands out, and that is the essentiality of coastal water service to shippers the country over.

* * *

Finally, of course, is the importance to national defense of having domestic tonnage readily available in an emergency. This fact must not be overlooked in discussing the importance of this segment of the merchant marine in terms of national policy.

As indicated in the next preceding quotation, coastwise shipping is important also for general public use as an integral part of the national transportation system. The following taken from *War Shipping Administration T. A. Application*, 260 I. C. C. 589, 591 (1945), is true today:

The dependency of ports and coastal areas upon the existence of water transportation is well known. The economy of such areas, to a large extent, is founded upon the availability of such transportation, without which a large part of their economy would not have

9. Quoted by the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Interstate and Foreign Commerce in its report, dated August 29, 1960, on the "Decline of the Coastwise and Intercoastal Shipping Industry," 86th Congress, 2d Session.

been developed, and with the discontinuance of which a large part of their normal economic activity will cease to exist.

Section 307(f) of the act provides that in prescribing just and reasonable rates by water, we shall give due consideration, among other factors, to the effect of the rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable water carriers, under honest, economical, and efficient management, to provide such service. The provisions of this paragraph are similar to those in sections 15a(2) and 216(i). Also, section 305(c) provides that "Differences in the * * * rates * * * and practices of a water carrier in respect of water transportation from those in effect by a rail carrier in respect to rail transportation shall not be deemed to constitute * * * an unfair or destructive competitive practice."

Section 307(d), in authorizing the Commission to establish through routes and joint rates in connection with water and rail carriers, provides that "where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water." While this provision is not controlling here, where the rates by water under investigation were voluntarily established, and most of them apply in connection with a water carrier and motor carriers, nevertheless, considered with the other provisions of the act above mentioned, it appears indicative of the Congressional intent that, where necessary to permit an essential, efficiently-operated water carrier to participate in the economical movement of traffic, the service in connection with the water carrier should be accorded some advantage in the form of lower rates. This is so not only on traffic between the ports, but also to and from interior

points, for coastwise carriers can not survive on port-to-port traffic alone. As stated in *Dominion Rates from Eastern Ports to the Southwest*, 264 I. C. C. 551, 559:

The steamship lines plying between north Atlantic and Gulf ports must, in order to operate successfully, participate in the handling of traffic to and from interior points. In order to participate in such traffic, the rates over such lines must be on a lower level than those over all-rail routes.

There is no contention that the coastwise lines here before us are not efficiently operated. Shipper evidence on these records is indicative of a need by the general public for the services of those lines, and that they represent an important and essential part of a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense. There is, of course, a limit beyond which these carriers cannot be expected to attract traffic from interior points at economical rates. We are satisfied that their rates here under investigation, except as noted in the findings herein, do not go beyond that limit.

In the circumstances presented here, we are of the opinion that the objectives of the national transportation policy require the establishment and maintenance of a differential relationship between the rates under investigation on sea-land and Seatrail service, on the one hand, and the rates of the rail carriers, on the other, which will allow these water carriers operating in the coastwise trade to maintain rates that will enable them to continue efficient and economical coastwise service.

It appears to us, however, that the 10 percent differential sought by Pan-Atlantic would be excessive. The differences between the sea-land and the all-rail services are not so marked as to require that wide a rate difference. In our judgment, the rail TOFC rates on the commodities from and to the points concerned in I. & S. No. 6834 should be maintained on a level no lower than 6 percent above

Pan-Atlantic's sea-land rates, so long as the latter are not increased above their present levels. While the matter of an appropriate differential for sea-land service or Seatrain service under rail boxcar service is not here directly in issue, it may be helpful for the future guidance of the parties to express our view that, as boxcar service is inferior to TOFC service, the differential under the boxcar rates should be somewhat less than 6 percent.

Upon reconsideration, in I. & S. No. M-10415 and the proceedings embraced therein we affirm the prior findings that 11 of the rates under investigation on the commodities from and to the points shown in footnote 4 of this report are not shown to be just and reasonable, and that the other rates under investigation are lawful.

In I. & S. Nos. 6906 and M-11375, and proceedings embraced therein, we find that nine of the rates under investigation, on the commodities from and to the points shown in footnote 10, are noncompensatory and thus are not shown to be just and reasonable, and that the other rates under investigation are lawful.

In No. 32313, we find that the sea-land rate of 216 cents, minimum 20,000 pounds, on paint and paint materials from Baltimore to Dallas and Fort Worth, is unjust and unreasonable, and that the other sea-land rates and the Seatrain rates under investigation are lawful.

In I. & S. No. 6834, we find that the proposed reduced TOFC rates are not shown to be just and reasonable, and the proposed schedules will be required to be canceled, without prejudice to the filing of new schedules in conformity with the conclusions herein. Since these proposed rates are not shown to be just and reasonable, the fourth section application for relief to establish such rates will be denied.

Appropriate orders will be entered.

10. Paper and paper bags from Hodge and Advance, La., to Miami, Fla.; petroleum products from New Orleans, La., to Melbourne and Miami, Fla.; glass bottles from Lancaster, N. Y., to Miami; synthetic plastics from Buffalo, N. Y., to Dallas and Fort Worth, Tex.; and beer from Philadelphia, Pa., to Daytona Beach, Fla.

COMMISSIONER HUTCHINSON, *concurring*:

I am in general agreement with the majority report.

In I. & S. No. 6834, the majority concludes that on a fully distributed basis, sea-land is a lower cost service than TOFC. Thus the ultimate effect of approval of the schedules would be to allow rates of the high-cost carrier to gravitate to a level whereby the low-cost carrier will be forced to go below its full costs in order to participate in the traffic.

A regulated competitive mode of transport maintaining rates not in excess of maximum reasonableness should not publish reductions resulting in revenue losses, for the sole purpose of obtaining traffic being handled by another mode. Such proposals constitute, in my opinion, destructive competitive practices which the National Transportation Policy condemns.

I am not convinced, however, that a differential of 6 percent is warranted on this record, but since I do not believe the "without prejudice" finding constitutes an effective prescription of a differential, I concur in the majority decision.

COMMISSIONER McPHERSON, *concurring in part*:

I would approve all the rates which are compensatory but on this record I would not impose any differential.

COMMISSIONER FREAS, *whom CHAIRMAN WINCHELL and COMMISSIONER WEBB join, dissenting in part*:

My views concerning the issues presented in I. & S. No. M-10415 have been set forth in a separate expression to the prior report of Division 3 in this proceeding, 309 I. C. C. 587, 606. The same reasoning is in general applicable to the other proceedings embraced herein. I shall therefore confine my remarks to the additional points raised by

the parties and by the majority in its Summary and Conclusions.

With one possible exception, neither respondents nor protestants appear to dispute the basic concepts set forth in my prior expression, particularly those dealing with the guiding principles to be followed in competitive rate-making. The railroads do contend that these principles go too far and overlook a tremendous impetus which they would give to private carriage. Apparently the railroads believe that the effect of these principles would be to require the return of fully distributed costs in every instance. That anyone should place such a construction upon my prior expression was wholly unexpected. The views expressed dealt with the situation at hand which is limited to inter-mode competition between regulated carriers. The standards set forth in no way preclude action necessitated by either the existence or the threat of exempt transportation.

Pan-Atlantic merely asserts that my suggestion as to cancellation and refile of rates in conformity with the guiding principles would not be "practicable" here. It contends that because of the strong conflict between the parties concerning the relative values or advantages of the respective services to the shipping public unavoidable litigation would in most instances follow such refile. This contention is not directed to the principles involved but to the evidentiary facts. The determination of these factual issues would be relatively simple were it not for the broad scope of the proceedings here, which involve hundreds of different commodity rates. The burden of proof is on respondents; in the absence of a clear showing of representativeness, orderly regulatory processes preclude the approval of differentials in all instances upon justification only of some.

In support of its conclusion that rate differentials, rail over water, are warranted here the majority appears to rely heavily upon the national transportation policy. It is said

that the differentials are necessary in order to allow the coastwise lines to continue their essential service. Specifically the majority stated: "Shipper evidence on these records is indicative of a need by the general public for the services of those lines, and that they represent an important and essential part of a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense." However, all that the record indicates in this regard is that although in certain instances shippers may consider the advantages or disadvantages of the respective services offered, the controlling factor in choosing between the involved modes of carriage is generally the level of the rates. There is no evidence here that either the commerce of the United States or the national defense would be hampered unless the water carriers, though not shown to have the inherent advantage in many instances, are given an artificial rate advantage. A reiteration of some of the language contained in the national transportation policy is in and of itself no substitute for essential supporting evidence. See *Pacific Inland Tariff Bureau v. United States*, 129 F. Supp. 472. Nor are there any subsidiary findings in the report to substantiate any of the specific differentials proposed by the water carriers or suggested by the majority.

The decision of the majority may well be taken to stand for the proposition that water carriers are ordinarily entitled to rate differentials regardless of the circumstances of the specific case. I do not read the statute to require as a matter of law, or even to permit, blanket protection from reasonable competition for the water carriers, or for that matter for any mode of transportation. Indeed, even the water carriers have not gone this far in their construction but have, in the last Congress, sought legislation to that effect.

APPENDIX A
RATES, COSTS, AND COST RATIOS

	<i>Sea-Land</i>						<i>Trailer-on-Flat-Car</i>												<i>Ratios</i>			
	<i>Costs</i>				<i>Ratio, rate to costs</i>		<i>Costs</i>								<i>Ratio, rate to costs</i>				<i>SL to TOFC costs</i>			
	<i>OP</i>		<i>FD</i>		<i>OP</i>	<i>FD</i>	<i>OP</i>		<i>FD</i>		<i>OP</i>		<i>FD</i>		<i>OP</i>		<i>FD</i>		<i>OP</i>	<i>FD</i>	<i>OP</i>	<i>FD</i>
	<i>Min.</i>	<i>Rate</i>					<i>Min.</i>	<i>Rate</i>	<i>RR</i>	<i>TTX</i>	<i>RR</i>	<i>TTX</i>	<i>RR</i>	<i>TTX</i>	<i>RR</i>	<i>TTX</i>	<i>RR</i>	<i>TTX</i>				
Ammunition, from New Haven, Conn.	30	299	138	175	217	171	30	299	214	186	259	231	140	161	115	129	64	74	68	76		
Candy or confec- tionery from Boston, Mass.	36	214	139	179	154	120	36	214	190	172	236	218	113	124	91	98	73	81	76	82		
Paint and paint materials from Jersey City, N. J.	36	190	111	137	171	139	36	190	182	166	225	209	104	114	84	91	61	67	61	66		
Printed matter from Phila., Pa.	23	273	172	212	159	129	23	273	250	204	292	246	109	134	93	111	69	84	73	86		
Wire goods, aluminum from York, Pa.	14	438	281	334	156	131	30	438	345	246	386	287	127	178	113	153	81	114	87	116		

SL is sea-land; TOFC is trailer-on-flat-car; TOFC rates are proposed; Min. is minimum weight in 1,000 pounds; ratios are in percents; OP is out-of-pocket; FD is fully-distributed; RR signifies railroad-owned flat cars with a capacity of one trailer; TTX signifies leased flat cars with a capacity of two trailers; destination of shipments is Dallas-Fort Worth.

APPENDIX B

RATIONALE OF COST FINDING SECTION

Cost Evidence:

Cost evidence relating to the trailer-on-flat-car service was introduced by the Southwestern rail carriers, Eastern rail carriers, and by the protestant, Pan-Atlantic Steamship Company. The Eastern rail carriers introduced a cost study for TOFC service based almost wholly on cost factors introduced by the Southwestern rail carriers. Since the cost evidence of the Southwestern rail carriers will be discussed in detail below, further comments on the Eastern rail carriers' cost evidence is considered unnecessary.

The Missouri Pacific Railroad Company introduced revenue and expense data intended to show that the proposed TOFC rates would produce compensative revenue when compared with the average revenue and operating expenses of carriers in the Central Western and Southwestern regions. The revenues and expenses were shown on a per-ton-mile and a per-car-mile basis for all traffic combined. In addition to not providing a separation of the expenses between terminal and line-haul and between out-of-pocket and fully distributed, these figures do not reflect the special characteristics of TOFC traffic, and therefore, are without probative value in measuring the compensatory nature of the proposed rates.

The Southwestern rail carriers originally presented cost data for the TOFC service with costs based on handling one trailer per flat car, two trailers per flat car, and with percentages of empty return of zero, 50 and 100 percent. Subsequently additional evidence was introduced which superseded the original presentation. This latter evidence was based on costs for the year 1956 from Statement No. 2-58 of the Bureau of Accounts, Cost Finding and Valuation, and adjusted by respondent to a level of May 1, 1958. It compares out-of-pocket costs with the proposed rates for

one trailer per car, for two trailers per car, and on a combined basis reflecting 75 percent two trailers per car and 25 percent one trailer per car. The empty return ratio used for the line-haul expense was 25 percent. The respondent considered the combined showing to be the most appropriate, although it conceded that such a performance was not presently attained. Based on respondent's cost presentation the proposed rates exceed out-of-pocket costs for all movements.

The protestant water carrier took many exceptions to respondent's cost presentation and restated the costs. A comparison of the proposed rates with the protestant's restated out-of-pocket costs showed most of the rates to be below out-of-pocket cost.

In order to more fully understand the cost elements involved herein a short description of the services rendered the TOFC traffic may be helpful. At point of origin the trailer is loaded at the shipper's dock and then moved to the ramp area of the originating railroad. The trailer is subsequently loaded onto the flat car and is tied down or made secure to the car. Upon completion of the loading the cars are switched from the ramp to the outbound train along with other types of cars. The train is then given a line-haul movement to the Western gateway where the TOFC cars are switched to the delivering railroad's ramp and the trailers are untied and removed therefrom. At the present time the TOFC cars are not interchanged between the railroads so that direct movement of the trailers is required for delivery to the connecting line. After delivery to the connecting carrier's ramp the trailers are again placed on flat cars and tied down and subsequently moved to final destinations, where the cars are again switched to a ramp, the trailers untied and removed, delivered to the consignee and unloaded, and returned to the railroad terminal. So far as these proceedings are concerned two types of cars are involved: one is a flat car of single trailer capacity which is equipped with tie-down devices; and the other is a car especially designed to hold two trailers with special hold-

down devices. The latter type of car is at present not owned by the railroads but is leased from a car company under mileage agreement and is referred to as a trailer-train car. The abbreviation of TTX will be used herein in referring to the two-trailer cars while the single-trailer cars will be referred to as R.R.-owned cars.

In view of the many points of controversy over the cost evidence in these proceedings each element of cost will be discussed individually below with the comments and evaluation by the Cost Finding Section immediately following each item.

(1) *Source and level of expense data:*

Respondent:

In its final cost presentation respondent based its rail costs on unit expenses shown in Statement No. 2-58 of the Bureau of Accounts, Cost Finding and Valuation, which showed costs for the year 1956 and also costs adjusted to a level of January 1, 1958. Respondent considered the costs as of January 1, 1958 to be overstated, and therefore used the 1956 costs adjusted to what it purported to be a May 1, 1958 level. This was accomplished as follows: The total operating expenses for the year 1957 were related to the total operating expenses for the year 1956 for the Eastern district and Western district separately. The percent of increase was found to be 1.57 percent for the Eastern district and .83 percent for the Western district. A cost-of-living adjustment of 4 cents per hour as of May 1, 1958 was applied to the total service hours for the year 1957, United States as a whole, and the resulting amount of increase was related to the total operating expenses for the year 1956 for the United States as a whole to produce an additional adjustment of 1.14 percent. The latter amount was added to the previous percentage increases for the Eastern and Western districts to produce total adjusting percentages of 2.71 percent for the Eastern district and 1.97 percent for the Western district. These percentage adjustments were ap-

plied to the expenses for 1956 by respondent to produce costs as of May 1, 1958.

Respondent showed costs on an out-of-pocket level only. It contends that the amount of additional revenue which a commodity should produce above out-of-pocket cost should be contingent upon what the traffic can bear rather than on an arbitrary prorate based on averages of all traffic. Therefore, it did not show fully distributed expense.

Protestant:

In its restatement of the rail costs in respondent's Exhibit No. 3 protestant used the costs for the year 1955 shown in Statement No. 1-57, issued by the Bureau of Accounts, Cost Finding and Valuation, and underlying working papers thereto. These costs were adjusted for wage and price levels to January 1, 1958, based on data shown by rail carriers in Ex Parte No. 212.

Protestant showed its costs both on an out-of-pocket and fully distributed basis. The out-of-pocket costs include 80 percent of the operating expenses, rents and taxes, excluding Federal income taxes, plus a return of 4 percent after Federal income taxes, and 50 percent of the road property and 100 percent of the equipment. The fully distributed costs include, in addition to the out-of-pocket costs, the remaining 20 percent of the operating expenses, rents and taxes, the passenger train and less-carload operating deficits and return of 4 percent after Federal income taxes on the property as a whole. The revenue needs over and above the out-of-pocket costs are given a prorate ton and ton-mile distribution over all revenue traffic without distinction as to kind or class.

Cost Finding Section's comments:

The method used by respondent to adjust the 1956 expenses to a May 1, 1958 level completely ignores the amount of traffic moving in the respective years because only the

total operating expenses and a cost-of-living adjustment are used to obtain the final adjusting factors. Respondent's method of adjustment is unacceptable.

The method of adjustment to a level of January 1, 1958 used by protestant assumes the same level of traffic for both periods but adjusts for the level of wages and prices. When the adjustment is made in this manner for only a one-year period there is small likelihood of error. However, when such adjustment is made for two years or more there is a possibility of overstatement since any increase in efficiency of operations is ignored.

In view of the fact that the sea-land costs reflect 1957 expenses and the TOFC pickup and delivery, tie-down cost and trailer rental expenses are based generally on the year 1957, the remaining TOFC expenses should also reflect a level for the year 1957. Accordingly the Cost Finding Section believes that the costs shown in its Statement No. 2-58, which are based on the year 1956 operations with adjustment to reflect wage and price levels as of January 1, 1958, are appropriate for use herein and these costs have been used in the restatement of respondent's and protestant's cost evidence. (A check of the costs shown in Cost Finding Section's Statement No. 5-58, which shows costs based on expenses for the year 1957, indicates very close agreement between those costs and the costs as of January 1, 1958 shown in Statement No. 2-58. The costs in Statement No. 5-58 would have been used in the Cost Finding Section's restatement except for the fact that this statement is not of record.) The out-of-pocket cost is the significant measure as to whether or not a rate is compensatory, but for comparative purposes we have also supplied the fully distributed costs in our restatement.

(2) *Switching at origin and destination:*

Respondent:

For the cost of switching at the TOFC ramps respondent used one-third of the territorial average switching time.

The factor of one-third was based on data furnished by the Pennsylvania and the Baltimore and Ohio Railroads in the East, and the Texas and New Orleans, Texas and Pacific, St. Louis-Southwestern and Missouri Pacific Railroads in the Southwest. In computing the switching expense per car respondent included an allowance of 25 percent for switching empty cars.

Protestant:

Protestant contended that the data supplied to respondent by the various railroads were deficient in that they did not make allowance for switching of the empty car or for non-productive time of the yard locomotives. Protestant stated that the switching data used by respondent was, in some instances, based on estimates and it contends that a detailed study should have been made to determine the switching time of the TOFC traffic. The protestant restated the switching minutes to include an allowance for switching of empty cars equal to the number of loaded cars and for non-productive time. In the Eastern district protestant's restated figure amounted to 12.9 minutes per car which, when related to the territorial average of 30 minutes per car, produced a ratio of 43 percent. Protestant used 45 percent of the territorial average in its restatement. In the Western district protestant used a restated figure of 16.4 minutes per car which, when compared with the total average of 26 minutes per car, produced a ratio of 63 percent. Protestant used a ratio of 65 percent in its restatement.

Cost Finding Section's comments:

We believe that respondent should have made detailed switching studies to determine the switching minutes per car for the TOFC traffic. In its restatement of respondent's switching minutes for the Eastern district, the protestant used only the minutes for the Pennsylvania Railroad at Kearney, New Jersey, Pittsburgh, and Philadelphia, and

for the Baltimore and Ohio at Philadelphia. It ignored the time at St. Louis of 2.1 minutes per car submitted by the Pennsylvania Railroad in a letter to protestant under date of March 25, 1958, which is part of the working papers that parties agreed could be used. When this time is taken into account and adjusted for empty and non-productive time, the average switching minutes in the Eastern district is reduced from 12.9 minutes to 11.4 minutes. The Cost Finding Section does not agree with protestant's use of 100 percent allowance for empty switch which is normal for other than boxcar traffic. Once the loaded TOFC cars have been placed in the ramp there is no need to switch them away from the ramp until they are to be made up into a returning train except in those instances where the capacity of the ramp is limited to less than the total number of cars received. Except for reference to the four-car capacity of the Baltimore and Ohio TOFC ramp at Philadelphia, the record does not provide evidence as to this necessity and, in the absence thereof, the Cost Finding Section believes that an allowance for switching empty cars equal to the amount of empty movement that is present in the line-haul operation is appropriate. Therefore, we have adjusted protestant's switching minutes to reflect 25 percent empty switching in the Eastern district and 50 percent empty switching in the Western district. The use of these empty return ratios is discussed in a subsequent item. The adjusted switching minutes per car compute to 7.13 minutes in the East and 12.30 minutes in the West. When related to the territorial average minutes per car of 30.6 in the East and 26.7 in the West shown in Statement No. 2-58, the ratio of TOFC switching minutes to the territorial average becomes 23 percent for the East and 46 percent for the West.

(3) *Freight-train car costs:*

Respondent:

Respondent used a ratio of 45 percent of the territorial average for the freight-train car costs of railroad-owned

cars. This was based on an average detention at origin and destination combined of 1.7 days as compared to the territorial average of 3.75 days. Respondent made no distinction between railroad-owned cars and privately owned cars.

Protestant:

Protestant also used a ratio of 45 percent of the territorial average for railroad-owned cars. The protestant developed the rental expense per car-mile for the TTX cars separately and the freight-train car costs for these cars is reflected in the line-haul expense.

Cost Finding Section's comments:

In its restatement of the costs the Cost Finding Section has used 45 percent of the territorial average for the TOFC freight-train costs for railroad-owned cars and has used protestant's treatment for the TTX cars.

(4) *Carload station clerical expense:*

Respondent:

Respondent included carload station clerical expense based on 50 percent of the territorial average for the East and for the West.

Protestant:

Protestant included this expense in total for each territory.

Cost Finding Section's comments:

In view of the fact that the TOFC traffic is interchanged between the Eastern district and Western district and would move on through billing respondent's treatment is proper and has been followed in the Cost Finding Section's restatement.

(5) *Loss and damage expense:**Respondent:*

Respondent included the territorial loss and damage clerical expense and the loss and damage claim payments based on the United States average for all other manufacturers and miscellaneous articles and for alcoholic beverages or liquor separately.

Protestant:

Protestant also included loss and damage clerical expense and loss and damage claim payments except that protestant included the loss and damage claim payments for each territory rather than once for the entire movement.

Cost Finding Section's comments:

In obtaining the loss and damage clerical expense from the carload unit cost sheets protestant used the expense per ton shown therein for an expense per hundredweight. Protestant's expenses of .599 cent for the Eastern district and 1.472 cents for the Western district should have been .030 cent and .074 cent, respectively. The loss and damage claim payments should have been included only once for the entire movement since these figures are based on United States averages without regard to length of haul. The loss and damage clerical expense and the loss and damage claim payments have been included correctly in our restatement.

(6) *Interchange expense:**Respondent:*

The costs from Statement No. 2-58 include interchange expense in the line-haul expense based on a cost per car-mile. The statement provides for eliminating the interchange expense per car-mile and stating it on a per-interchange basis where such treatment is desired. Respondent has availed itself of this option and has included inter-

change expense based on 1.5 interchanges per loaded move in the East and .5 interchange in the West, subsequently increased for the empty movement. Over-the-street trailer interchange cost at the gateway point between Eastern and Western territories is included separately. Respondent contends that interchanges between certain carriers do not entail the switching and cost normally associated with interchange service and that they are merely paper transactions for division of revenue purposes. This would be true for interchanges between the Missouri Pacific and Texas and Pacific, the Atchison, Topeka and Santa Fe and the Gulf, Colorado and Santa Fe and the Kansas City Southern and Louisiana and Arkansas Railroads, and would also be true of certain interchanges in the East. Respondent stated that in the Western district it could not foresee any interchanges other than the so-called paper interchanges of TOFC traffic destined to Dallas or Fort Worth as between the Western district carriers, since the carriers named above provide direct routes between the gateways and Dallas and Fort Worth.

Protestant:

Protestant takes exception to respondent's reduction of the number of interchanges. It contends that even though complete switching service may not be required for those points referred to as paper interchanges there is still some cost associated with such service which should be included. In developing the line-haul cost the protestant has used both a shortest route and a longest route over actual rail lines and has included the expense for the actual number of interchanges required over each, including so-called paper interchanges.

Cost Finding Section's comments:

Respondent is correct in its contention that the cost for a paper interchange is considerably less than the cost for an interchange where normal switching is involved. However,

the elimination of the entire cost for the paper interchanges is not considered proper, considering the fact that the interchange costs in Statement No. 2-58 are based on all types of interchanges as reported by the carriers. Thus, if the cost for paper interchanges were to be excluded the remaining interchange cost would have to be based on the expense per actual interchange which would be somewhat higher than the cost shown in Statement No. 2-58.

Protestant is wrong in including an interchange expense for the transfer of cars between the A. T. & S. F. and the G. C. & S. F. railroads. Because these two roads operate and report as a system the transfer of cars between them is not reported as an interchange. The expense for the transfer is reflected as intertrain or intratrain switching which protestant has included fully on a car-mile basis.

In its restatement the Cost Finding Section has included the average interchange costs expressed on a car-mile basis with the line-haul expenses. Since the interchange at the gateways between the East and West is performed by interchange of the trailer only and not of the rail car, a reduction equivalent to one-half the cost of a full interchange has been applied to the terminal costs in each territory. The effect of this treatment is to include roughly 0.6 interchange for a 900-mile haul in the West and from 1.8 to 2.6 interchanges for hauls of 900 to 1,200 miles, respectively, in the East.

(7) *Intertrain and intratrain switching:*

Respondent:

Respondent included intertrain and intratrain switching on a per car-mile basis but included only 50 percent of the total shown in Statement No. 2-58. The use of 50 percent of the territorial average was not based on any special studies made by respondent but was based on respondent's belief that the trains in which the TOFC traffic moves are subject to less than average switching en route.

Protestant:

Protestant included the intertrain and intratrain switching expense on the territorial average basis without reduction.

Cost Finding Section's comments:

In view of the fact that respondent failed to introduce evidence showing that the TOFC traffic actually receives less than the average intertrain and intratrain switching the use of the territorial average expense for this service is considered to be proper and has been included in the Cost Finding Section's restatement.

(8) *Trailer rental expense:****Respondent:***

Respondent based its costs for trailer rental on an average charge of \$4.00 per day for a one-day period of 6.7 days (round-trip 13.4 days) plus an allowance for 25 percent empty return. This amounted to a total cost of \$33.50 per loaded trailer.

Protestant:

The protestant stated that the elapsed time used by respondent did not take into consideration the fact that trailers may be idle over the week-end, and that there might not be 100 percent utilization of the trailers; therefore, it based its cost on a 14-day round-trip or seven days one-way plus an allowance for empty return. Based on a rental cost of \$4.00 per day this produced a cost of \$44.80.

Cost Finding Section's comments:

Testimony of record indicates that the running time between origin and destination would average 5 days, or 10 days for the round trip. An allowance of two days' time at the origin and at destination would appear to be reasonable.

Therefore, in its restatement the Cost Finding Section has used an allowance for trailer rental cost based on a 14-day round trip adjusted for empty return instead of a 13.4-day round trip by respondent. The trailer rental cost thus computed amounts to \$38.50 per loaded trailer. The allowance for empty return for trailer rental amounting to 37.5 percent is the average of 25 percent empty return in the East and 50 percent in the West. These percentages are discussed subsequently.

(9) *Trailer interchange expense:*

Respondent:

Respondent based its costs for the over-the-street interchange of the trailer at the gateway between East and West on figures furnished by the Baltimore and Ohio and Pennsylvania Railroads, the average of which computed to \$5.25 per hour. Allowing one hour for the interchange and adjusting for 25 percent empty return, respondent computed a total of \$6.56 per loaded trailer for the interchange.

Protestant:

Protestant based its expense on figures furnished by the Pennsylvania Railroad, Missouri Pacific and Baltimore and Ohio and included allowance for 100 percent empty movement. A figure of \$24.90 was included for the Baltimore and Ohio, which combined with the amount of \$11.28 for the Pennsylvania Railroad and \$15.76 for the Missouri Pacific Railroad, produced an average of \$17.31 per loaded trailer.

Cost Finding Section's comments:

The figure of \$12.45, excluding allowance for empty, as used by protestant for trailer interchange for the Baltimore and Ohio, appears to be excessive when compared with respondent's figure of \$4.85. The record does not provide

information as to this discrepancy, therefore, the Cost Finding Section has used respondent's figure of \$4.85 in its restatement. Protestant showed a figure of \$7.88 for the Missouri Pacific Railroad based on 1.5 hours at a cost of \$5.25 per hour. This latter figure has been included with respondent's figure to produce an average of \$6.12. When the latter amount is adjusted for an empty return amounting to 50 percent, a total cost of \$9.18 per trailer interchange is obtained. The latter figure is used in the Cost Finding Section's restatement.

(10) *Trailer tie-down and untie cost:*

Respondent:

Respondent used a basic cost for placing the trailers on the car and securing them and for releasing them and removing them from the cars of \$9.00 per trailer in the East and \$8.00 per trailer in the West. These figures were subsequently adjusted for 25 percent empty return giving total costs of \$11.25 per trailer in the East and \$10.00 per trailer in the West.

Protestant:

After adjusting the figures furnished to respondent by the various railroads for a clerical cost item protestant used figures of \$9.60 per trailer in the East and \$8.50 in the West for the trailer train cars, and \$24.84 in the East and \$8.50 in the Western district for railroad-owned cars.

Cost Finding Section's comments:

It was brought out in the record that the figures used by the protestant for tie-down costs in the Eastern district were based on figures furnished by the Baltimore and Ohio which included not only the service at the ramp but the movement of the trailers between the ramp and shipper or consignee. In order to correct for this overstatement by

protestant the Cost Finding Section has substituted the cost of \$9.60 as used by protestant for trailer train cars for the \$24.84 it showed for railroad-owned cars in the Eastern district. In the Western district the Cost Finding Section has used protestant's figure of \$8.50 for both railroad-owned and TTX cars. After adjustment for the respective empty return allowances the total cost per trailer becomes \$12.00 in the East and \$12.75 in the West.

(11) *Pickup and delivery expenses:*

Respondent:

The pickup and delivery costs include the movement of the empty trailer from the carrier's motor terminal to the shipper's dock, the loading of the trailer and the return of the loaded trailer to the ramp at the origin point, and the movement of the loaded trailer from the ramp at destination to the consignee's dock, unloading, and the return of the empty trailer to the ramp or to the carrier's motor terminal. Based on data furnished by the participating railroads respondent developed costs of \$9.00 per load in the East and \$6.90 per load in the West for the movement of trailers between the ramps and shipper's and consignee's docks. The loading and unloading expense used by respondent was 12.8 cents per hundredweight in the East and 11.3 cents per hundredweight in the West.

Cost Finding Section's comments:

The protestant used the respondent's figures in its cost presentation and the Cost Finding Section has done likewise in its restatement.

(12) *Weight of train for TOFC traffic:*

Respondent:

Respondent based its line-haul costs on those for through trains without adjustment for any reduction in the

weight of the train for expedited service. Respondent contends that the TOFC traffic is generally handled in regularly scheduled through trains and thus should reflect the cost of through train operations.

Protestant:

Protestant computed its line-haul cost of the TOFC traffic based on through train costs but with the weight of the train reduced by 25 percent. Protestant contends that the TOFC traffic moves in manifest trains and receives expedited service, and that such manifest trains normally operate with tonnage ratings which are from one-third to one-fourth less than other through trains because of the speed at which these trains are operated. It also cited movement by the Pennsylvania Railroad of the TOFC traffic from New York to Philadelphia with only 10 or 12 cars in a train. It also stated that the Baltimore and Ohio trains in which the TOFC traffic is handled have tonnage ratings that have 25 percent to 30 percent less traffic than other through trains. The effect of protestant's treatment is to increase the gross-ton-mile portion of the line-haul expense by roughly five percent in the Eastern district and by three percent in the Western district.

Cost Finding Section's comments:

Although it may be true that the TOFC traffic may receive expedited service in less than average weight trains in some instances protestant has not shown this to be true generally. With regard to the movement by the Pennsylvania Railroad of the TOFC traffic between New York and Philadelphia in small trains this movement comprises only a small part of the total movement from Eastern points to the Southwest and it cannot be assumed that because such movement occurs over a short distance the same would be true for the remainder of the haul. In addition, the effect of protestant's adjustment on the total line-haul expense is

negligible. In the absence of special studies which would show the actual average weights of trains in which the TOFC traffic is handled, the Cost Finding Section believes that the use of the through train average cost is proper and this has been used in its restatement.

(13) *Tare Weight of cars and trailers:*

Respondent:

Respondent made no adjustment in its costs for the difference in tare weights of the cars used for TOFC service from the tare weight of ordinary flat cars. Also, it made no adjustment for the difference in weight for flat cars of two-trailer capacity from those of one-trailer capacity. In addition, it failed to include the tare weight of trailers in computing its expenses. It also failed to distinguish between railroad-owned cars and cars rented on a mileage basis.

Protestant:

Protestant developed its costs for railroad-owned cars and for those cars rented on a mileage basis (TTX cars) separately. Based on figures furnished by several railroads concerned with the TOFC traffic it determined that the tare weight for railroad-owned cars was 55,200 pounds before addition of the tare weight of the trailer. After addition of the 11,500 pounds average tare weight of a trailer the total tare weight of the railroad-owned car becomes 66,700 pounds. For the TTX cars it determined the average weight to be approximately 78,000 pounds before addition of the trailer tare weight. Based on information furnished by the railroads protestant determined that in the Eastern district the TTX cars were loaded with an average of 1.7 trailers per car and in the Western district the TTX cars are operated with an average of 1.45 trailers per car. The total tare weight of the TTX cars and trailers computes to

97,550 pounds in the Eastern district and 94,675 pounds in the Western district.

Cost Finding Section's comments:

The respondent is in error in not recognizing the difference in tare weights between the type of cars and in not making allowance for the additional tare weight of the trailers. The use by protestant of the average number of trailers per car for the TTX cars is also considered to be proper because this reflects the average utilization of the cars. The Cost Finding Section has used protestant's tare weights in its restatement except for a reduction of 800 pounds in the tare weight of TTX cars based on information in the working papers. It has used average number of trailers in the East of 1.7 trailers per TTX car and 1.5 trailers per TTX car in the Western district in its restatement.

(14) *Net load per TTX car:*

Respondent:

Respondent assumed a net load for cars carrying two trailers of twice the minimum weight per shipment.

Protestant:

The protestant developed the net load for TTX cars by adding to the minimum weight per shipment an amount equal to .7 of an average weight per shipment taken as 30,000 pounds in the East and .45 of 30,000 pounds in the Western district. The figures of .7 and .45 are derived from the average number of loaded trailers handled on TTX cars as described in item 13 above.

Cost Finding Section's comments:

The use of twice the minimum weight by respondent is incorrect since it overlooks the fact that a trailer of one

minimum weight may be handled with a trailer carrying an entirely different load on the same flat car and also ignores the fact that the average utilization of the TTX cars appears to be less than the maximum possible of two trailers per car. The Cost Finding Section has used protestant's procedure except that it has rounded off the figure of .45 to .50.

(15) *Empty return ratio:*

Respondent:

Respondent developed its line-haul expenses using an allowance for empty return of 25 percent for the ratio of empty car-miles to loaded car-miles. This figure was based on judgment and reflects a long range viewpoint. It does not actually represent the empty return ratio experienced at the time the evidence was placed on record. Respondent feels that the figure of 25 percent is a reasonable figure to expect considering the increasing use of TOFC service.

Protestant:

Based on information furnished by the participating railroads protestant used ratios of empty to loaded TOFC car-miles of 60 percent for railroad-owned cars in both the East and West, and 23 percent in the East and 100 percent in the West for TTX cars.

Cost Finding Section's comments:

An examination of the working papers shows that in the Eastern district the Baltimore and Ohio showed no empty trailer movement on its own cars in either direction during the month of January 1958. During the same month the Pennsylvania Railroad showed an empty return of 23 percent for its TTX cars. Based on these showings the Cost Finding Section feels that use of a ratio of empty to loaded car-miles of 25 percent in the Eastern district

for both railroad-owned and for TTX cars is not unreasonable, and it has used this ratio in its restatement. The working papers also show that in the Western district the Texas and New Orleans Railroad showed a ratio of empty to loaded car-miles of 49 percent for the months of October, November, and December of 1957, and January 1958 for railroad-owned cars. Other carriers in the Western district showed a ratio of 100 percent empty return for both railroad-owned cars and TTX cars. The Cost Finding Section believes that the high empty return ratios experienced in the Western district will not remain static but will be reduced as the TOFC traffic develops. The TOFC service concerned herein is in reality a substitute for boxcar service. It is reasonable to assume, therefore, that the empty return ratio would approach that of boxcars. Statement No. 2-58 shows the ratio of empty to loaded car-miles for carload boxcar traffic to be 36 percent. The use of an empty return ratio of 50 percent for the Western district is, therefore, considered to be reasonable and this has been used in our restatement.

(16) *Line-haul miles:*

Respondent:

Respondent based its line-haul miles on the average short-line distance between the origin and the Chicago and E. St. Louis gateways, and between the gateways and destination increased by 13 percent to allow for circuitry.

Protestant:

Protestant computed costs for so-called shortest practicable routes and longest practicable routes.

Cost Finding Section's comments:

If these proceedings did not involve Fourth Section considerations, costs computed for respondent's mileages

would suffice. Because Fourth Section considerations are involved, the costs based on routes longer than the average are important to measure the compensativeness of the proposed rates over the more circuitous routes. Therefore, the Cost Finding Section has used both respondent's average mileages and protestant's longest mileages in its restatement of the costs.

Conclusion:

Based on the relationship of present sea-land rates to the sea-land costs as restated for the commodities concerned herein, the present sea-land rates equal or exceed the restated out-of-pocket cost for all movements and exceed the fully distributed expense except for eight movements.

The proposed TOFC rates equal or exceed the restated out-of-pocket TOFC costs computed for hauls with average circuitry for all movements by TTX car and for all but six movements by railroad-owned cars. The proposed rates equal or exceed the fully distributed costs for 14 movements by railroad-owned cars and for 43 movements by TTX cars, out of the 66 rail movements. The restated sea-land costs, both out-of-pocket and fully distributed, is below the restated TOFC cost for all movements of comparable weight.

For hauls with the greatest amount of circuitry the proposed TOFC rates equal or exceed the out-of-pocket costs for 33 of the movements on railroad-owned cars and for 62 of the movements on TTX cars. Based on information in the working papers for these proceedings it appears that a greater number of trailers is carried on TTX cars than on railroad-owned cars.

APPENDIX C

RATES, COSTS, AND COST RATIOS

(Rates and costs in cents per 100 pounds; Ratios in percents; minimum weights in 1,000 pounds; SL is Sea-Land; OP is out-of-pocket; FD is fully-distributed; PA is Pan-Atlantic; MC is motor carrier; AR is all-rail.)

		SL		OP Costs			FD Costs			Ratio SL Rates to Costs		AR Rate and Costs		OP		FD		Ratios SL to AR Costs	
		Min.	Rate	PA	MC	Sum	PA	MC	Sum	OP	FD	Min.	Rate	OP	FD	OP	FD	OP	FD
Sewer Pipe	Sherman, Tex., to Clearwater, Fla.	52#	124	59	53	112	68	69	137	111	91	36	133.5	88	114	127	120		
Bottle Caps	New York, N. Y., to Jacksonville	30	125	67	52	119	77	72	149	105	84								
Paper fabric bags	New Orleans, La., to Orlando, Fla.	22	130	58	23	81	68	34	102	160	127								
Rosin	Cross City, Fla., to New York, N. Y.	36	105	63	23	86	72	37	109	122	96								
Canned Goods	Fort Pierce, Fla., to Brewster, N. Y.	40	104	44	42	86	51	66	117	121	89								
Petroleum	Baton Rouge, La., to Miami, Fla.	26	117	40	62	102	46	88	134	115	87								
Paper boxes	Miami, Fla., to Philadelphia, Pa.	36	108	51	25	76	59	37	96	142	113								
Ammunition	Bridgeport, Conn., to Alexandria, La.	30	289	68	60	128	79	84	163	226	177								
Canned Goods	Ft. Pierce, Fla., to New York, N. Y.	40	94	57	22	79	65	36	101	119	93								

26,000 pounds are used as load per trailer when two trailers used for 52,000 pounds.

NOTE: Rail costs are shown for those movements where protestants introduced rail costs. Rail costs are adjusted to reflect loss and damage claim payments, shown in Bureau of Accounts, Cost Finding and Valuation Statement No. 2-58, applicable to the commodities in question.

APPENDIX D

Order

At a Session of the INTERSTATE COMMERCE COMMISSION,
held at its office in Washington, D. C., on the
19th day of December, A. D. 1960.

INVESTIGATION AND SUSPENSION DOCKET NO. M-10415
COMMODITIES—PAN-ATLANTIC STEAMSHIP CORPORATION

INVESTIGATION AND SUSPENSION DOCKET NO. M-10430
ADIPIC ACID—BOUTTE & LULING, LA., TO EAST

INVESTIGATION AND SUSPENSION DOCKET NO. M-10431
COMMODITIES—SEA-LAND—LOUISIANA TO EAST—
P. A. S. S. Co.

INVESTIGATION AND SUSPENSION DOCKET NO. M-10434
VARIOUS COMMODITIES—N. J., N. Y. & PA. TO FLA. & TEXAS

INVESTIGATION AND SUSPENSION DOCKET NO. M-10437
PULPBOARD-FIBERBOARD—EVADALE, TEX., TO NEW YORK, N. Y.

INVESTIGATION AND SUSPENSION DOCKET NO. M-10469
ALUMINUM ARTICLES—MASSENA, N. Y., TO TEXAS

INVESTIGATION AND SUSPENSION DOCKET NO. M-10582
VARIOUS COMMODITIES, SEA-LAND, EAST TO FLA., LA., TEX.

INVESTIGATION AND SUSPENSION DOCKET NO. M-10599
PAPER—SOUTH TO N. Y. AND N. J.

INVESTIGATION AND SUSPENSION DOCKET NO. M-10602
COMMODITIES—EAST TO ALA., FLA., AND TEXAS

INVESTIGATION AND SUSPENSION DOCKET NO. M-10624
FOODSTUFFS—LA. AND MISS. TO CONN., MD., MASS., N. Y.
PA., AND R. I.

INVESTIGATION AND SUSPENSION DOCKET NO. M-10679
FEED—FLORIDA TO NEW ENGLAND AND TRUNK LINE TERR.

INVESTIGATION AND SUSPENSION DOCKET No. M-10698
SEA-LAND—PAN-ATLANTIC S. S. CORP.—PLASTICS &
WIRE CLOTH

INVESTIGATION AND SUSPENSION DOCKET No. M-10716
BRUSHES—CONN., MASS., AND N. Y. TO TEXAS

INVESTIGATION AND SUSPENSION DOCKET No. M-10721
VARIOUS COMMODITIES—PAN-ATLANTIC STEAMSHIP
CORPORATION

INVESTIGATION AND SUSPENSION DOCKET No. M-10722
SEA-LAND—VARIOUS COMMODITIES—P. A. S. S. Co.

INVESTIGATION AND SUSPENSION DOCKET No. M-10825
COMMODITIES—PAN-ATLANTIC SEA-LAND SERVICE

INVESTIGATION AND SUSPENSION DOCKET No. M-10945
COMMODITIES—PAN-ATLANTIC STEAMSHIP CORP.

INVESTIGATION AND SUSPENSION DOCKET No. M-10946
COMMODITIES—EAST, SOUTH & SOUTHWEST

INVESTIGATION AND SUSPENSION DOCKET No. M-10963
VARIOUS COMMODITIES—PAN-ATLANTIC SEA-LAND SERVICE

INVESTIGATION AND SUSPENSION DOCKET No. 6847
FRESH OR FROZEN FOODS—SEA-LAND—PAN-ATLANTIC
S. S. CORP.

INVESTIGATION AND SUSPENSION DOCKET No. 6848
PAPER—ALA. TO FLA. AND FLA. TO TEXAS

INVESTIGATION AND SUSPENSION DOCKET No. 6870
ALUMINUM & PETROLEUM—TEXAS & LA. TO FLORIDA

INVESTIGATION AND SUSPENSION DOCKET No. 6894
COMMODITIES—PAN-ATLANTIC, FLA., LA. & TEXAS

INVESTIGATION AND SUSPENSION DOCKET No. 6985
FROZEN CITRUS PRODUCTS—FLORIDA TO OFFICIAL &
NEW ENGLAND POINTS

INVESTIGATION AND SUSPENSION DOCKET No. 6834

PIGGY-BACK RATES—BETWEEN EAST AND TEXAS

No. 32313

COMMODITIES—PAN-ATLANTIC—BETWEEN EAST AND TEXAS

FOURTH-SECTION APPLICATION No. 34227

TRAILER-ON-FLAT-CAR SERVICE BETWEEN OFFICIAL

TERRITORY AND DALLAS-FORT WORTH, TEX.

INVESTIGATION AND SUSPENSION DOCKET No. 6906

COMMODITIES VIA PAN-ATLANTIC BETWEEN TEXAS.

LOUISIANA AND FLORIDA

INVESTIGATION AND SUSPENSION DOCKET No. 6918

BAGS AND BOXES—NEW ORLEANS, LA., TO FLA.

INVESTIGATION AND SUSPENSION DOCKET No. M-11051

CLAY AND ROSIN—SOUTH TO EAST

INVESTIGATION AND SUSPENSION DOCKET No. M-11034

CANNED GOODS—FORT PIERCE, FLA., TO BREWSTER, N. Y.

INVESTIGATION AND SUSPENSION DOCKET No. 6932

PETROLEUM PRODUCTS—BATON ROUGE TO MIAMI

INVESTIGATION AND SUSPENSION DOCKET No. M-11264

VARIOUS COMMODITIES—PAN-ATLANTIC STEAMSHIP CORP.

INVESTIGATION AND SUSPENSION DOCKET No. M-11259

PAN-ATLANTIC STEAMSHIP—BETWEEN EAST, SOUTH, AND
SOUTHWEST

INVESTIGATION AND SUSPENSION DOCKET No. M-11077

COMMODITIES VIA PAN-ATLANTIC—EAST TO FLA., LA.,
AND TEXAS

INVESTIGATION AND SUSPENSION DOCKET NO. M-11361
CANNED GOODS—FORT PIERCE, FLA., TO NEW YORK, N. Y.

INVESTIGATION AND SUSPENSION DOCKET NO. M-11375
TIRES, CHEMICALS, AND PAINT VIA PAN-ATLANTIC

INVESTIGATION AND SUSPENSION DOCKET NO. M-11387
COMMODITIES IN MOTOR-WATER-MOTOR SERVICE—N. J. & PA.
TO FLA. AND TEX.

INVESTIGATION AND SUSPENSION DOCKET NO. M-11465
VARIOUS COMMODITIES—EAST TO SOUTH & SOUTHWEST

INVESTIGATION AND SUSPENSION DOCKET NO. 6962
ROOFING—NEW ORLEANS TO TAMPA

INVESTIGATION AND SUSPENSION DOCKET NO. M-11421
IRON OR STEEL CASTINGS OR FORGINGS, HOUSTON, TEX. TO
BUFFALO, N. Y.

INVESTIGATION AND SUSPENSION DOCKET NO. M-11486
MACHINERY—NEW BRITAIN, CONN., TO LUBBOCK, TEX.

INVESTIGATION AND SUSPENSION DOCKET NO. M-11369
ALUMINUM AND JUNK, MISS. & ALA. TO EAST

It appearing, That in I. & S. No. M-10415 and embraced proceedings, on February 10, 1960, the Commission, Division 3, made and filed a report in this proceeding, ²309 I. C. C. 587, and that upon petition of the railroad protestants, to which the respondents replied, the proceeding was reopened for reconsideration;

It further appearing, That in I. & S. No. M-10415 and embraced proceedings, the Commission, on the date hereof, had made and filed a report on reconsideration, which report, and the report of February 10, 1960, are hereby referred to and made a part hereof;

APPENDIX D

RATES, COSTS, AND COST RATIOS

(Rates and costs in cents per 100 pounds; ratios in percents; minimum weights in 1,000 pounds; SL is Sea-Land; OP is out-of-pocket; FD is fully-distributed; PA is Pan-Atlantic; MC is motor carrier; AR is all-rail.)

Commodity	From	Sea-Land		OP Costs			FD Costs			Ratio SL Rates to Costs		All-rail Rate and Costs			Ratios SL to AR Costs	
		Min.	Rate	PA	MC	Total	PA	MC	Total	OP	FD	Min.	Rate	OP	OP	FD*
Copper cable	New Haven, Conn.,	30	180	69	28	97	80	40	120	186	150	30	189	101	96	
	to Tampa, Fla.	60#	161	69	28	97	80	40	120	166	134	50	170	67	145	
Floor covering	Kearney, N. J.,	32	166	80	43	123	92	58	150	135	111	30	175	106	116	
	to Monroe, La.															
Roofing or building paper	Long Branch, N. J.,	40	127	56	27	83	65	45	110	153	115	40	166	102	81	
	to Galveston, Tex.															
Roofing or roofing material	New Orleans, La.,	80**	41	41		41	47		47	100	87	80	43	25	164	
	to Tampa, Fla.															
Aluminum extrusions	Gulfport, Miss.,	30	178	68	38	106	79	59	138	168	129	30	181	97	109	
	to Trenton, N. J.															
Iron or steel castings and forgings	Houston, Tex.,	40	152	62	70	132	71	96	167	115	91	60	160	71	186	
	to Buffalo, N. Y.	80**	146	62	70	132	71	96	167	111	87	60	160	71	186	
Power trans- mission machinery	New Britain, Conn.,	20	318	110	143	253	127	179	306	126	104	24xx	335	162	156	
	to Lubbock, Tex.															

*—Rail fully-distributed costs not shown.

**—40,000 pounds used as load per trailer when two trailers used for 80,000 pounds.

#—30,000 pounds used as load per trailer when two trailers used for 60,000 pounds.

xx—24,000 pounds subject to rule 34 of the classification.

It further appearing, That by orders in the other above-entitled proceedings, except I. & S. No. 6834, and No. 32313, the Commission entered upon investigations concerning the lawfulness of the rates, charges, regulations, and practices stated in certain schedules described in said orders, and suspended the operation of the schedules for a period of seven months, said schedules now being in effect;

It further appearing, That in I. & S. No. 6834, by order dated November 8, 1957, the Commission entered upon an investigation concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules described in said order, and suspended the operation of the schedules to and including June 13, 1958, and that the respondents voluntarily postponed their effective date;

It further appearing, That in No. 32313, by orders dated November 8, 1957, and December 18, 1957, the Commission, on its own motion, entered upon an investigation concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules described in said orders, said schedules being in effect and under investigation only:

And it further appearing, That a full investigation of the matters and things involved has been made, and that said division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereto, which report is hereby referred to and made a part hereof;

It is ordered, That Fourth Section Application No. 34227 be, and it is hereby, denied.

It is further ordered, That the respective respondents herein be, and they are hereby, notified and required to cancel the said schedules, to the extent found not shown to be lawful in the said report made a part hereof, on or

before February 6, 1961, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under the Interstate Commerce Act, and that these proceedings be, and they are hereby, discontinued.

By the Commission.

HAROLD D. McCoy,
Secretary.

(SEAL)

[309 I. C. C. 587]

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. M-10415¹

COMMODITIES—PAN-ATLANTIC STEAMSHIP CORPORATION

Decided February 10, 1960.

Sea-land local and joint single-factor through rates on numerous commodities, in trailerload, multiple trailerload, and volume quantities, over single-line routes of

1. This report embraces also 23 other proceedings. Twenty-two of these were orally heard, namely, I. & S. No. M-10430, Adipic Acid from Boutte & Luling, La., to East; I. & S. No. M-10431, Commodities, Sea-Land—Louisiana to East, Pan-Atlantic Steamship Corporation; I. & S. No. M-10434, Various Commodities from New Jersey, New York, and Pennsylvania to Florida and Texas; I. & S. No. M-10437, Pulpboard and Fiberboard from Evadale, Tex., to New York, N. Y.; I. & S. No. M-10469, Aluminum Articles from Massena, N. Y., to Texas; I. & S. No. M-10582, Various Commodities, Sea-Land, East to Florida, Louisiana, and Texas; I. & S. No. M-10599, Paper from the South to New York and New Jersey; I. & S. No. M-10602, Commodities from the East to Alabama, Florida, and Texas; I. & S. No. M-10624, Foodstuffs from Louisiana and Mississippi to Connecticut, Maryland, Massachusetts, New York, Pennsylvania, and Rhode Island; I. & S. No. M-10679, Feed from Florida to New England and Trunk Line Territory; I. & S. No. 6847, Fresh or Frozen Foods—Sea-Land-Pan-Atlantic Steamship Corporation; I. & S. No. 6848, Paper from Alabama to Florida and Florida to Texas; I. & S. No. M-10698, Sea-Land-Pan-Atlantic Steamship Corporation, Plastics and Wire Cloth; I. & S. No. M-10716, Brushes from Connecticut, Massachusetts, and New York to Texas; I. & S. No. M-10721, Various Commodities—Pan-Atlantic Steamship Corporation; I. & S. No. M-10722, Sea-Land—Various Commodities, Pan-Atlantic Steamship Corporation; I. & S. No. M-10825, Commodities, Pan-Atlantic Sea-Land Service; I. & S. No. M-10945, Commodities, Pan-Atlantic Steamship Corporation; I. & S. No. M-10946, Commodities, East, South and Southwest; I. & S. No. M-10963, Various Commodities, Pan-Atlantic Sea-Land Service; I. & S. No. 6870, Aluminum and Petroleum, Texas and Louisiana to Florida; and I. & S. No. 6894, Commodities—Pan-Atlantic, Florida, Louisiana, and Texas. The last 10 listed proceedings originally were part of a separate record entitled I. & S. No. M-10698 et al., but later by agreement these proceedings were merged for handling in the same report with those entitled I. & S. No. M-10415 et al. The twenty-fourth proceeding herein is I. & S. No. 6985, Frozen Citrus Products from Florida to Official & New England Points, which has not been heard. By order dated February 17, 1959, Division 2, acting as an appellate division, ordered that this proceeding be consolidated for disposition in a report with I. & S. No. 6847.

Pan-Atlantic Steamship Corporation and over joint-line routes of motor common carriers and Pan-Atlantic, from, to, and between numerous points in the East, on the one hand, and, on the other, points in the South and Southwest; also from and to points in the South, and between such points, on the one hand, and, on the other, points in the Southwest, found lawful, except as indicated in the report. The excepted rates ordered canceled, and proceedings discontinued.

William H. Ambrecht, Jr., L. A. Parish, and Warren Price, Jr., for respondents and motor-carrier participants in the carrier's tariffs.

Charles W. Bucy and Leonard M. Shinn for the Secretary of Agriculture of the United States, intervenor in support of the carrier.

[309 I. C. C. 588]

Edwin J. Miller and J. J. A. Winzenried for other interveners in support of the carrier.

Joseph Hodgson, Jr., and S. S. Eisch for an intervenor as its interests may appear.

Edwin N. Bell, James A. Bistline, J. P. Canney, Arthur J. Dixon, Earl E. Eisenhart, Jr., Robert Falet, Russel L. Frink, R. C. Gill, Ernest D. Grinnell, Jr., Carl Helmetag, Jr., Bernard Hulkower, Eugene E. Hunt, William Q. Keenan, Howard D. Koontz, V. H. Livingston, Donald McDevitt, J. Edgar McDonald, Prime F. Osborn, Leo H. Pou, Clarence Raymond, B. V. Reynolds, Charles P. Reynolds, Albert B. Russ, Jr., Walter G. Trevelyan, Donald L. Turkal, R. S. Trigg, and Harold B. Wahl for protestant railroads.

Guy H. Postell, Reuben G. Crimm, James E. Haydon, and J. G. Quisenberry for protestant motor carriers.

Report of the Commission

DIVISION 3, COMMISSIONERS FREAS, WALRATH, AND
McPHERSON

BY DIVISION 3:

These proceedings are related and will be disposed of in one report. Exceptions to the report proposed by the examiner, and replies thereto, were filed by certain of the protestants and the respondent, Pan-Atlantic Steamship Corporation, hereinafter called Pan-Atlantic (appearing also for connecting motor common carriers). Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective on October 29, 1957, in I. & S. No. M-10415, and later in the other proceedings, Pan-Atlantic and the motor common-carrier participants in its tariffs proposed to establish approximately 469 reduced commodity rates² for the transportation in "sea-land" service of numerous commodities,³ in trailer-load, multiple trailer- [309 I. C. C. 589] load, and volume quantities, from, to, and between numerous points in the East, South and Southwest. Upon protests of rail carriers in these areas, The Eastern Central Motor Carriers Asso-

2. Rates and costs are stated per 100 pounds.

3. Including brass, bronze, or copper rods, candy and confectionery, silica gel, radio and television sets, lead, adipic acid, alcoholic liquors, synthetic plastics, rubber, building and paving materials, ammoniacal liquors, sodium acetate, ammonium chloride, potassium caustic, lard, mud-treating compounds, petroleum, plastic materials, springs, clay tile, welding compound, pulpboard, fiberboard, aluminum articles, bags or bagging, calcium chloride, shortening acids, soda, sodium nitrate, paper and paper articles, electrical appliances, air-conditioners, glass bottles, paint, printing paper, wall paper, lube oil, canned or preserved foodstuffs, animal or poultry feed (citrus pomace), frozen foods, frozen fruit products (concentrates), fresh citrus fruit, frozen vegetables, frozen seafoods, paper bags, wrapping paper, paper boxes, aluminum wire cloth, bronze wire cloth, brushes, brush factory products, coal tar dyes, chemicals, Christmas tree holders, cement paste, machinery, spices, spring assemblies, tile, iron or steel wire cloth, woodpulp, aluminum oxide catalyst, transformers, frit, pumps, paint pigments, wallboard, metallic sodium, coffee, iron and steel articles, braided paper, soap, shipping carriers, molasses, chocolate syrup, phosphorus pentasulfide, flour-bleaching compound, graphite, softener, ammunition, building metal work, chewing gum, copperas, cordage, toilet preparations and drugs, floor covering, lamps, automobile tires, aluminum billets, and window glass.

ciation, Inc., and the Southern Motor Carriers Rate Conference, Inc., the operation of the schedules was suspended to and including May 28, 1958 in I. & S. Docket No. M-10415, and later in the other proceedings, after which the schedules became effective.⁴ For convenience, the rates under investigation will sometimes be referred to herein as proposed rates.

The Secretary of Agriculture of the United States, Keystone Macaroni Manufacturing Company, Inc., and Devoe & Reynolds Company, Inc., appeared in support of Pan-Atlantic. Seatrain Lines, Inc., hereinafter called Seatrain, also appeared in support of its interests. Seatrain at present operates in a rail-water coastwise service by the use of freight cars as containers.

As a common carrier of general commodities and passengers, Pan-Atlantic is authorized to operate generally between the ports of Boston, Mass., New York, N. Y., Philadelphia, Pa., Baltimore, Md., Georgetown and Charleston, S. C., Jacksonville, Miami, Tampa, Port St. Joe, Panama City, and Pensacola, Fla., Mobile, Ala., New Orleans, La., and Galveston and Houston, Tex. The operating rights of Pan-Atlantic include the transportation of property loaded in motor-vehicle trucks or trailers on trailerships. *Pan-Atlantic S. S. Corp. Operating Rights*, 297 I. C. C. 773.

The sea-land service.—Sea-land service is also called trailer-ship (trailer-on-ship) or fishyback service. In this service the lading is transported over both highway and water in the same containers. These are 35-foot trailer bodies, of special design, which are detachable from the trailer chassis. The trailerships are so constructed that each trailer body fits into a slot to prevent shifting at sea. From the standpoint of the shipper, sea-land service is essentially a motor-carrier operation, the principal difference

4. In I. & S. Docket No. 6985, by order of August 5, 1958, the schedules were suspended to and including March 8, 1959. On August 7, 1958, this proceeding was discontinued, but on November 11, 1958, it was reopened. On February 17, 1959, the order of August 5, 1958, was vacated insofar as it suspended the operation of the schedules, but the investigation thereof was continued.

being that the container is moved a considerable distance on an ocean-going ship.

In sea-land service, the consignor may have the container sealed. Generally, this assures that the lading will not again be handled until it arrives at the consignee's place of business and is unloaded under his supervision. Trailer bodies are not sealed when they are to receive additional lading at some other point. Less-than-truckload freight ordinarily would not be sealed [309 I. C. C. 590]. In sea-land service the trailer bodies are lifted on and off the ships by the use of two gantry-type cranes on the vessels. Each crane is capable of unloading one trailer body and placing another on board ship in about 5 minutes. Basic loading procedures call for the placing of an outbound container on the ship, and replacing an inbound container on the same trailer chassis which was used to bring the outbound container to the pier. The patented cranes are parts of the ship, and eliminate the need for costly shore installations. The cranes make it possible to serve any port having adequate water and dockside aprons large enough to permit bringing a truck chassis alongside the vessel.

The stevedoring expense of the old break-bulk service of Pan-Atlantic was about three to four times greater than the vessel-operating costs, whereas in sea-land service the stevedoring expense is small compared with the vessel cost. Compared with the break-bulk service, sea-land has reduced considerably Pan-Atlantic's cargo handling time, its in-port vessel time, and its loss, damage, and pilferage expenses.

The trailer bodies used by Pan-Atlantic in sea-land service have a capacity of about 2,088 cubic feet for dry-cargo and open-top equipment, and of about 1,520 cubic feet for refrigerated equipment. Whether the containers are loaded or empty, a full complement of 226 containers is carried on each voyage. It is necessary to keep a balance of containers at the several ports, and the stability of the trailerships must be maintained.

To achieve the proper balance of the cargo, fore and aft, port and starboard, and top and bottom, it is necessary that there be a systematized sequence of loading the trailer bodies. For this purpose, many of the outbound containers are assembled at a parking lot near the port at least 60 hours in advance of arrival of the ship, and the bulk of the cargo must be delivered to shipside parking lots at least 12 hours before the arrival of the ship. The proper sequence of loading affects the trim of the vessel, the list of the vessel during and upon completion of loading, and the degree of roll and stability. In addition, certain types of containers must be stowed in a limited number of positions only, depending upon the weight, the container construction, the cargo carried, and the destination. One truck breakdown enroute to the parking lot from a pickup point could destroy the entire planned loading sequence for any one hatch. Generally, Pan-Atlantic cannot accept sea-land freight and load it on a ship the same day.

Both single-line and joint-line sea-land services are provided by Pan-Atlantic. It operates single-line between ports and port terminal areas which it is authorized to serve, by use of its trailerships [309 I. C. C. 591] on the water and leased tractors and trailers on the land. The motor equipment is leased from an affiliated corporation, and is operated under the Pan-Atlantic name and operating rights. In some instances Pan-Atlantic has operated single-line 60 miles beyond a port. The extent of its single-line operations are the subject of complaints in dockets Nos. MC-C-2163 and 2167.

The joint-line sea-land service of Pan-Atlantic extends well beyond the ports and port terminal areas. For example, electrical appliances may move joint-line, motor-water-motor, from Somersworth, N. H., via the ports of New York, (Port Newark, N. J.) and Houston to Dallas, Tex. Where the route is listed in part as "motor", it means line-haul service under the operating rights of motor common

carriers, and not single line-haul service under the operating rights of Pan-Atlantic.

Presently, Pan-Atlantic is a wholly-owned subsidiary of McLean Industries, Inc., hereinafter called McLean. The total investment in the new type sea-land operations made by McLean or its subsidiaries or affiliates has been between \$40 and \$45 million, including about 50 percent for conversion of break-bulk type vessels to sea-land vessels, over \$20 million for automotive equipment, and about \$500,000 for procurement of terminal facilities, including docks, piers, staging areas, and warehouses.

The pool of highway equipment which is or will be available to Pan-Atlantic consists of about 3,000 dry-cargo (closed-van) trailer bodies, 500 mechanically-refrigerated containers, 300 open-top containers, 1,700 trailer chassis, 300 tractors, and miscellaneous vehicles. While there will be a total of 3,000 dry-cargo containers, about one-third of these will be used in a trailer-on-ship service to Puerto Rico. The dry-cargo container, used by Pan-Atlantic in sea-land service, plus a trailer chassis, weighs about 10,000 pounds, and has a payload capacity of about 40,000 pounds.

The sea-land tariffs do not provide extra charges for the use of refrigerated equipment, and the rates on commodities requiring such equipment are adjusted to provide for this expense. The mechanically-refrigerated containers have dual-type motors. An electrical motor is used for the refrigerating machinery while a container is aboard ship, and a motor using butane or other fuel when it is on land. A refrigerated container plus a trailer chassis weighs a total of about 13,000 to 14,000 pounds, and has 6 inches of insulation. The greater weight of the refrigerated equipment, together with State maximum weight laws, results in smaller maximum permissible loads of payload freight in the refrigerated equipment than in dry-cargo containers. For this reason, in computing adjusted costs, 35,000 pounds is used herein on frozen and fresh commodities mov- [309 I. C. C. 592] ing in refrigerated equipment in sea-land serv-

ice via Port Newark over New Jersey highways as the maximum load per trailer, in lieu of the tariff minima of 36,000, 40,000, and 80,000 pounds.

The New Jersey highway weight limitation is 60,000 pounds, and the maximum weight of payload freight depends upon the equipment utilized. In Investigation and Suspension Docket No. 6985, Pan-Atlantic published rates with minima of 35,000 and 70,000 pounds on frozen or chilled fruit products from Florida origins moving via Port Newark over New Jersey highways to eastern destinations. The minimum weights in I. & S. Docket No. 6985 were coupled with the same rates as were then under investigation in Investigation and Suspension Docket No. 6847, wherein the former minima were 36,000 and 80,000 pounds. The suspension of the rates in I. & S. Docket No. 6985 was vacated partly in consideration of the agreement of Pan-Atlantic to abide by the order resulting from the investigation in I. & S. Docket No. 6847. Any further discussion or findings herein which relate to the same rates in both I. & S. Dockets Nos. 6847 and 6985, but which relate to the different minima in those dockets, will be considered as relating to the lower minima of 35,000 and 70,000 pounds (2 trailers). These lower minima by reason of the State weight laws will result in more economic operations by Pan-Atlantic in the utilization of refrigerated trailers.

History of Pan-Atlantic operations.—Beginning in 1933, Pan-Atlantic operated as a conventional break-bulk carrier, except during the World War II years. In April 1956, it started using two tanker-trailerships, converted from T-2 tankers, in its Atlantic-Gulf coastwise service. Four tanker-trailerships ultimately were placed in this service, but have been removed. Those ships transported 60 containers on deck in addition to bulk oil in the tanks.

In May 1957, Pan-Atlantic suspended its Atlantic-Gulf coastwise break-bulk service to provide vessels for conversion into trailerships. For its land service in the Atlantic-Gulf coastwise trade, it converted four ships into

trailerships, each with a capacity of 4,000 tons of payload freight, and each holding 226 containers, of which 166 are stowed below deck and 60 on deck. The ships are 468 feet long and capable of a speed of about 15.5 knots, substantially the same as when the ships were used in the break-bulk service.

In October 1957, Pan-Atlantic began trailership service to and from the ports of New York, Miami, Houston, and Tampa. Later, the port of New Orleans was added, and for a time the port of Philadelphia (Wilmington, Del.) was served. In April and May 1958, the Pan-Atlantic trailership scheduled service included a round trip between the ports of New York and Houston direct, and a round trip between the ports of New York and New Orleans, serving [309 I. C. C. 593] the port of Miami on the southbound journey, and the port of Tampa on the northbound journey.

In addition to its sea-land service as described above, Pan-Atlantic provides a break-bulk service in the inter-coastal trade between Pacific and Atlantic ports. Pan-Atlantic or an affiliate has provided, or will provide, another trailership service between north Atlantic ports and Puerto Rico.

Water carriers and the national defense.—Prior to World War II there were about 19 deep-water common carriers operating in the Atlantic-Gulf coastwise trades, employing about 139 vessels. In 1940, these water carriers transported over 8,500,000 tons of cargo. Today, only two carriers operate in this trade, namely, Seatrain and Pan-Atlantic, operating, respectively, six and four vessels. A comparison introduced by Pan-Atlantic shows that between 1939 and 1956, the tonnage handled by class I railroads in the United States increased 160.5 percent, and the tonnage handled by class I motor carriers increased 545.6 percent. Excluding bulk oil carried by Seatrain and Pan-Atlantic, the tonnage handled by water carriers in the Atlantic-Gulf coastwise trade suffered a decrease of 79 percent.

Since World War II there has been a substantial expansion of commerce in the United States, particularly in the South and Southwest, but an exception to the general growth of transportation has been the Atlantic-Gulf coastwise dry-cargo tonnage of the water service. Pan-Atlantic estimates that Seatrain operating at full capacity could transport about 1,000,000 net tons annually, and that Pan-Atlantic could transport about 800,000 net tons per year (100 round-trip voyages with full loads of 4,000 tons in each direction). The total for the two water carriers would be 1,800,000 net tons, compared with over 8,500,000 net tons transported prewar by the water carriers in the same trade. Excluding bulk petroleum carried in tankers, Pan-Atlantic carried in excess of 1,000,000 tons in its coastwise break-bulk service in 1950. In 1956 and 1957, it carried in coastwise service only 433,915 and 332,057 tons, respectively.

Upon resumption of break-bulk service following World War II, Pan-Atlantic and other domestic coastwise water carriers were handicapped seriously by substantial increases in operating costs, particularly costs in loading and unloading cargo from the ships. The United States Maritime Administration stated in a 1955 review, in part:

Traffic figures indicate that the decline in dry-cargo tonnage has occurred primarily, if not wholly, in the break-bulk dry-cargo trades where rising costs, particularly in loading and discharging the ship, have largely eliminated the so-called inherent economic advantages of ocean transport.

The basic, long-range solution of the break-bulk dry-cargo problem appears to lie in the adoption of technological improvements which will reduce cargo handling [309 I. C. C. 594] and other related costs and result in less in-port time and better vessel utilization.

In Pan-Atlantic's opinion, these proceedings involve the survival of an important segment of our domestic merchant marine. The expenses in the present sea-land trailer-

ship operation are from \$10 to \$12 per cargo ton less than those incurred in the previous break-bulk type operation. This reduction in expense is mainly a result of the reduction in cargo-handling time and in-port vessel time.

The sea-land rates.—The sea-land rates under investigation herein are from, to, or between points in 15 States, namely, Massachusetts, New Hampshire, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, and Maryland in the East; Florida, Alabama, Mississippi, and Louisiana (in part) in the South; and Louisiana (in part), Texas, and Oklahoma in the Southwest. Among the 469 rates listed as here under investigation, some are representative of other rates where those shown are believed by Pan-Atlantic to be sufficient to show the principle of rate-making employed by that carrier.

In addition to the rates under investigation, sea-land rates also are published from, to, or between points in the States of Maine, Vermont, Virginia, West Virginia, Ohio, Tennessee, South Carolina, and Arkansas, points in Canada, and in the District of Columbia. About 250 motor carriers participate in Pan-Atlantic's tariffs. Since Pan-Atlantic has recourse to numerous connecting motor carriers whose operations reach throughout the United States, the rail protestants consider Pan-Atlantic's sea-land service to be an actual and potential threat to much of their long-haul, heavy-loading, and high-rated tonnage. There are other pending proceedings in which Pan-Atlantic rates are under investigation, and the parties therein have stipulated that the instant records may be considered in those proceedings.

Pan-Atlantic published these sea-land commodity rates to secure traffic in competition with other carriers (whether rail, motor, or water), and particularly in competition with the overland carriers. Since the record does not show specifically that any traffic has moved via Pan-Atlantic at rates as high as the competing rail rates, Pan-Atlantic insists that its rates must be differentially lower than the rail rates. It also seeks differentials under the motor-carrier rates. The motor-carrier competition faced by Pan-

Atlantic is from common and private carriers, and from motor carriers hauling so-called exempt commodities. Where the competition is primarily with Seatrain, Pan-Atlantic proposes rate equalization with Seatrain. Some of the proposed sea-land rates, including those on toilet preparations and drugs in Investigation and Suspension Docket No. M- [309 I. C. C. 595] 10963, were published to equalize them with the barge rates published by C. G. Willis, Inc.

Pan-Atlantic sea-land rates include marine insurance of the lading without extra charge. To the extent that Seatrain does not provide such free marine insurance, Pan-Atlantic's charges would be lower than Seatrain's charges at equal rates. When Pan-Atlantic operated its prior break-bulk service, it also provided marine insurance between many points, but generally not between points in the East and the Southwest. In sea-land service when the lading is on the highways, the motor carrier provides insurance.

Traditionally, water rates, including water-rail and water-motor rates, have been maintained at levels differentially lower than the corresponding all-rail rates, principally because of disadvantages in the water services due to perils of the sea, slower transit time, and infrequency of sailings. The last major proceeding in which the rates of the Atlantic-Gulf coastwise water carriers were considered was *Class Rate Investigation, 1939*, 286 I. C. C. 5 (docket No. 28300—1952). Therein, the Commission prescribed reasonable maximum first-class rates on ocean-rail traffic, and also reasonable maximum percentage relations of the lower classes to first class, between north Atlantic ports and interior points in eastern seaboard territory, on the one hand, and, on the other, New Orleans and Baton Rouge, La., Texas Gulf ports, and interior points in the Southwest. Those class rates were designed to preserve the then-existing differentials of the ocean-rail rates under the all-rail rates.

Pan-Atlantic had in effect for a number of years arrangements for through and continuous carriage with the railroads, and joint rates with overland carriers, both rail and motor. Joint water-motor rates were published by Pan-Atlantic as early as 1936. It has also published so-called through nonconcurring rail-water class rates.

The prescribed rates in docket No. 28300 were class rates, whereas in the instant proceedings only commodity rates are in issue. Prior to the inauguration of its sea-land service, Pan-Atlantic maintained between points in eastern and southwestern territories a substantial number of joint truck-water commodity rates generally on the same level as the ocean-rail class rates prescribed in *Class Rate Investigation, supra*, and its class-rate structure between eastern and southwestern territories also was on the same general level as the prescribed ocean-rail class rates. Pan-Atlantic evaluated the rate structures of the existing water and overland carriers and concluded that its sea-land service needed rate differentials under all-rail rates, but that lesser differentials would suffice than those maintained under its previous break-bulk service.

[309 I. C. C. 596] For its trailership service, Pan-Atlantic first put into effect class rates, and later commodity rates. Generally, the class rates were protested, but were not suspended and became effective. Many of the commodity rates were suspended and are under investigation in these and other proceedings. The class-rate structure established by Pan-Atlantic varies depending upon origins and destinations, the direction of the competing rail rate-making routes, the constructive water mileages, and the prescribed maximum ocean-rail rates, among other factors. Generally, its trailership class rates are on the basis of 92.5 percent of the overland-carrier rates on terminal (port) to terminal (port) traffic; and on the basis of 95 percent of the overland rates on traffic moving from, to, or between interior points located beyond the terminals (ports).

The commodity rates for its trailership service in general, were related percentagewise to the all-rail commodity

rates in the same measure as the sea-land class rates are related to the all-rail class rates. As there are exceptions to the 92.5-95 percent formula in the class-rate structure, so also there are numerous exceptions to the formula for commodity rates. Individual adjustments are made in the latter rates because of varying competition with all-rail carriers, all-motor common carriers, Seatrain, a barge line, and exempt motor carriers. Also, there are instances where the sea-land rates were designed to preserve competitive relations between shippers located at different origins. The result is a wide fluctuation in the differentials between the sea-land rates and the all-rail commodity rates.

For example, the sea-land rate on paper boxes from Miami to Houston is 96 cents, minimum 36,000 pounds, compared with the all-rail rate of 143 cents, same minimum. In this instance the competition faced by Pan-Atlantic was the result of a leased-truck arrangement which offered a rate of 101 cents, minimum 32,000 pounds. This respondent urges that since the all-rail rates fail to bear a consistent relation to cost, sea-land differentials under all-rail rates can not and need not follow a consistent pattern on the basis of costs. It contends that the value-of-service consideration is of primary economic importance in the fixing of intercarrier rate differentials.

The protestant rail carriers point out that Pan-Atlantic has not attempted to justify the differential between any sea-land commodity rate and the rate of any other common or contract carrier by relating it to the added costs to the shipper in using the sea-land service, but that it relies on the assumption that a differential is required primarily because a part of the sea-land service is operated by water. For example, the justification, exclusive of Pan-Atlantic cost and other general evidence relating to the sea-land service, of the sea- [309 I. C. C. 597] land rate⁵ of 140 cents, minimum 26,000 pounds, on petroleum from Bayway, Elizabeth, and Nutley, N. J., to Goodhope, La., is that "All-rail

5. Where comparisons are made with all-rail rates, the rates include Ex Parte No. 206-A general increases were applicable.

service is the competition in every instance. The rates proposed for sea-land service are, in every case, 7 cents per 100 pounds under the all-rail rates. This figure represents a basis only 5 percent less than the all-rail rates". Nothing is said of the petroleum shippers' advantages or disadvantages, if any, in using the two competitive modes of transportation.

The proposed rates are said by Pan-Atlantic to cover fully-distributed costs in most instances, and in all instances to cover out-of-pocket costs. However, one rate, from New Orleans to Rochester, N. Y., on foodstuffs (canned goods) of 106 cents, minimum 36,000 pounds, admittedly does not cover out-of-pocket cost, and the respondent has indicated its intention to cancel that rate. Generally, the proposed sea-land rates are lower than the all-rail rates. In a few instances, for example, where there are several rates and minima on a commodity, the all-rail rates are lower than the proposed sea-land rates at the higher minima. Certain sea-land rates are listed in appendix A hereto, together with sea-land costs, and corresponding all-rail rates and costs. The sea-land costs are broken down between the Pan-Atlantic portion and the motor-carrier portion. Also shown are the ratios of the sea-land rates to the sea-land costs, and the ratios of sea-land costs to all-rail costs. The costs shown in this appendix are those obtained from a restatement of the sea-land costs developed by our Cost Finding Section.

Costs.—Pan Atlantic and the protestant rail carriers submitted extensive cost evidence. Protestant southern motor carriers also submitted cost evidence concerning the transportation of frozen concentrates. These cost studies have been considered by our Cost Finding Section, as requested by the parties, and that section has restated the sea-land costs. The restatement is too voluminous to be reproduced in its entirety, but representative results thereof are reproduced in appendix A, and the detailed rationale of the restatement will be found in appendix B hereto.

Of the 489 rates listed, including 20 rates canceled under special permission, 13 failed to yield out-of-pocket cost, and 145, or about 30 percent, failed to yield fully-distributed cost. In the circumstances here presented, a lawful rate need not necessarily yield fully-distributed cost. Some of the sea-land commodity rates are more than double the out-of-pocket costs and nearly double the fully-distributed costs. Other sea-land rates exceed the costs by narrower [309 I. C. C. 598] margins. The record does not show the volume of traffic which is expected to move or is now moving on any of these rates.

Pan-Atlantic is proposing a rate, for example, on shipping carriers (empty barrels and bottles) from Daytona Beach, Fla., to Philadelphia of 77 cents, minimum 16,000 pounds, for which the out-of-pocket cost as shown in the restatement is 147.8 cents. The out-of-pocket cost as shown by Pan-Atlantic is 72.3 cents. In the restatement, there are 13 listed rates which yield less than the out-of-pocket cost. Two of these were canceled under special permission, namely, the rates on canned goods from Houma, La., to Syracuse, N. Y., and from St. Martinsville, La., to Baltimore. Of the remaining 11 rates, aside from the above-mentioned rate on empty barrels and bottles, four apply on canned goods, four on pulpboard, and two on synthetic plastics. The canned-goods rates are from New Orleans to Baltimore (rate 99 cents, out-of-pocket cost 102.6 cents), from New Orleans to Rochester (rate 106 cents, out-of-pocket cost 115.3 cents), from Gulfport, Miss., to Philadelphia (rate 101 cents, out-of-pocket cost 103.6 cents), and from St. Francisville, La., to Miami (rate 92 cents, out-of-pocket cost 95.2 cents). The four rates on pulpboard are from Bogalusa, La., to New York, and from Kreole, Miss., to New York and to New Brunswick and Wharton, N. J.⁶

6. The rates listed on pulpboard from Bogalusa and from Kreole to New York apply only to stations in New Jersey taking the New York rates, and a higher listed rate applies to New York from Kreole. The higher listed rate exceeds out-of-pocket cost in the restatement.

These respective pulpboard rates are 92, 88, 90, and 88 cents, and their restated out-of-pocket costs are 95.5, 91, 91, and 91 cents. The two rates on synthetic plastics are from Baton Rouge to Baltimore and to Rome, N. Y. They are 109 and 122 cents, and their restated out-of-pocket costs are 113 and 123.8 cents.

The minimum weights used in computing the restated costs in connection with these 11 rates are the tariff minima. In instances where the tariff minima exceed 40,000 pounds and the shipments would necessitate using two trailers, the minimum weights used are half of the tariff minima. As indicated, the ratios of these 11 sea-land rates to their restated out-of-pocket costs range from 52 to 99 percent. Excluding the rate on empty barrels and bottles, the ratios range from 92 to 99 percent. These 11 rates do not appear to cover out-of-pocket costs, and thus are not compensatory.

One of the principal matters in dispute between the parties concerning the development of sea-land costs is the use by Pan-Atlantic of a load factor of 75 percent in computing its vessel and port out-of-pocket expenses. Pan-Atlantic's computations of its costs are based on its experience on five voyages. It states that the average load experienced was 75 percent of the maximum practical vessel [309 I. C. C. 599] utilization, and that in time its voyages will enjoy 100 percent practical utilization. Thus, it urges that only 75 percent of the vessel costs were out-of-pocket expenses. The Cost Finding Section used 100 percent of direct expenses before the addition of overhead to determine the out-of-pocket water costs of Pan-Atlantic. This treatment of out-of-pocket costs appears justified by the facts of record and by the usual costing methods.

The comparative value of the sea-land service.—Pan-Atlantic contends that the primary accomplishment of its sea-land trailer-ship service lies in the reduction of its internal operating expenses, rather than in any substantial improvement in the value of its service to the public. On

the other hand, the opposing carriers generally contend that there has been a substantial change in the character of Pan-Atlantic's service from the old break-bulk service to the new trailership service, and particularly in its value to the shipping public. Pan-Atlantic's own literature and public advertisements promise that its trailership service will save transportation costs, avoid delays, prevent damage, and accomplish a reduction in loss, damage, and pilferage. To substantiate their contentions, Pan-Atlantic and the opposing carriers offered the testimony of numerous shippers.

The views of the shippers as a whole were many and varied, according to their individual transportation problems. The most important factor to the shippers as a whole is the measure of the rates. The shippers want reasonably low rates, available over as many competing modes of transportation as possible. Many shippers would not use sea-land service at rates equal to or higher than all-rail or all-motor rates. A number of shippers also would not use sea-land service at rates higher than those of Seatrain. Some shippers, who would not use sea-land service if Pan-Atlantic's rates were equal to the rail rates, also would not offer any of their traffic now moving by sea-land service to the railroads if the rail rates are maintained at the present differentials over sea-land rates. Other shippers would not use all-rail service even at differentials under all-motor or sea-land rates. At least one shipper would use sea-land service at rates equal to the rail rates because of the drayage expense when using rail service. Price competition in the sale of some commodities is so keen that the shippers thereof cannot pay a transportation premium for one mode of a service as against another.

Time in transit.—Time in transit is a factor considered by many shippers in determining the value of a transportation service, and varies widely from commodity to commodity, and according to origins and destinations. A study by the rail carriers, using a random sampling technique,

showed an average transit time by rail of 10 days from New England to the Southwest, 9 days from New [309 I. C. C. 600] England to the South, 9 days from trunk line territory to the Southwest, and 8 days from trunk line territory to the South. This study indicates that rail service is far from uniform in the time required for what appear to be similar services. Advertised rail schedules were introduced by Pan-Atlantic which show 5 days from New York to Jacksonville, 4 days from Philadelphia to Tampa, 5 to 7 days from Baltimore to Miami, and 4 to 6 days from these origins to Dallas and Fort Worth.

A study made by Pan-Atlantic revealed average transit time by sea-land on four voyages during November and December 1957, of 13.98 days from eastern origins to Dallas and Fort Worth. Rail carriers point out that the latest sea-land schedules indicate that the vessels move between Newark and Houston in 6 days, between Newark and Miami in 3 days, and from Tampa to Newark in 4 days. Allowing 2 days at both origin and destination for the "land" portion of the trip, and adding the "sea" schedule, the rail carriers obtain total transit time somewhat faster than that obtained by Pan-Atlantic in its study. The rail carriers contend that the Pan-Atlantic study covers movements which occurred when the sea-land service was new and subject to operational difficulties which plague every new venture.

The rail carriers state that where there are no holidays or other exceptional circumstances, and where the motor-carrier operations of the sea-land service are conducted with reasonable dispatch, the sea-land transit time is as fast as or faster than all-rail. Generally, Pan-Atlantic has been able to adhere very closely, if not almost exactly, to the "sea" portion of its scheduled sea-land service. However, the perils of the sea do at times disrupt sailing schedules. All carriers are subject to delays in varying degrees as a result of labor disputes and the weather. Sea-land is also subject to the breakdown of vessels, for which substitutions are not readily available.

As to the land portion of Pan-Atlantic's service, several factors could result in delay. Trailers must be placed in proper sequence for loading, motor-carrier or consignee convenience may necessitate delay in delivery, and a particular container may be carried with more stops at intermediate points than others.

It is clear that the time consumed in loading and discharging a trailership in sea-land service is less than that in loading and discharging a break-bulk ship in the prior break-bulk service. Where it took two days for loading in the break-bulk service, it appears that one day would suffice in the sea-land trailership service. Thus, where comparable transit time warranted Pan-Atlantic rates for its break-bulk service under the all-rail rates, there is less justification for such a relationship in connection with the sea-land trailership service.

[309 I. C. C. 601] *Frequency of service.*—Frequency of service or sailings is another factor cited by many shippers. In many instances the railroads and the motor carriers provide daily service, or more frequent service than the once or twice a week service of sea-land. By rail a shipper may ship every day, but using sea-land he may have to bunch his shipments. In some instances, on the other hand, rail switching service is only semi-weekly. Some shippers consider that specific sea-land sailing dates and delivery dates are consistent, and that there are inconsistencies in rail departures and uncertainties in rail arrivals and delivery dates. The importance of frequency of service varies from commodity to commodity, and according to the individual needs of the various shippers.

Costs of loading or unloading.—Another factor considered by shippers is the cost of loading or unloading a trailer versus a box car. Pan-Atlantic's tariffs provide that in the

sea-land service, subject to certain restrictions and limitations, the truck driver will load and unload the trailers from and to points near the tailgate. In actual practice the driver is given considerable latitude. Generally, the Pan-Atlantic sea-land driver will provide the same service in loading and unloading as provided by motor common carriers in all-motor service. By contrast, the shippers and consignees generally are required to load and unload rail cars without any assistance from rail employees. One shipper found it necessary to have an additional man, as compared with the man power needed for rail shipments, to load sea-land trailers because its plant was constructed for rail shipments. Many shippers found that additional men or man-hours were required to load rail cars compared with sea-land trailers. Loading and unloading or assistance in these operations by the truck driver are not desired by some shippers and consignees. For example, beer and ale are loaded and unloaded by a shipper and his distributor-consignee with their own labor, whether the shipments move in trailers or in rail cars, but in this instance the Pan-Atlantic tariff requires, by appropriate restrictions, that the loading and unloading be by the shipper because of the weights of the pallets. Lift trucks are used in this operation.

Some shippers feel that the assistance of the truck driver in loading or unloading is offset in the use of rail cars by the provisions of 48 hours' free time for loading or unloading. Generally, in sea-land service, as in all-motor-carrier service, the trailers must be unloaded promptly upon arrival, but there are exceptions to suit the convenience of carriers and shippers. Some shippers are able to order trailer equipment and have it spotted within two hours. In some instances, Pan-Atlantic will place its trailers for loading 2 or [309 I. C. C. 602] 3 days prior to actual sailing dates, thereby enabling a shipper to load equipment at times when the shipper's warehouse labor otherwise would be idle. Many shippers have found no substantial differ-

ences in the cost of loading trailers and rail cars, and this factor to these shippers has not been a determining element in their selection of the mode of transportation.

Blocking, dunnage, and bracing.—Another factor considered by some shippers is the cost of blocking, dunnage, and bracing of shipments. Costs for strapping and flooring paper for rail box cars, including labor, were greater for one shipper than its costs for these items when it used sea-land trailers. Some shippers have found it more economical to load a trailer than a rail car because the former needs less dunnage, blocking, and bracing than the latter. Cleaning rail cars has been an added expense for some shippers. Other shippers have experienced no differences in the cost of using trailers or rail cars. Generally, less dunnage or no dunnage is required when damage-free or compartmentalized cars are used. A number of shippers state that dunnage, blocking, and bracing costs are not factors in determining the mode of transportation utilized.

Door-to-door service.—Door-to-door service is an important consideration to many shippers. In sea-land service, since the lading often moves in a sealed trailer from the door of the consignor to the door of the consignee without being handled enroute, the result is little or no damage. Where a shipper or consignee does not have a private or assigned rail siding, the sea-land service has a distinct advantage over rail service, the same as all-motor service. Thus, a shipper at its Miami and New Orleans warehouses has no private sidings, and would not use all-rail service even at differentials under all-motor or sea-land rates. Some New York City consignees do not have private or assigned sidings, which makes drayage necessary when using all-rail service. A survey made by Pan-Atlantic showed that out of 2,350 of its potential shippers and consignees, 1,805 or about 77 percent had private rail sidings, while 545 were either not located on rail sidings or were served by team tracks.

Loss or damage.—Generally, the experience of shippers using sea-land service has been that it entails either negligible or no loss, pilferage, or breakage, and it is not as subject to weather damage as the old break-bulk service with cargo in open holds. Many shippers have found that rail shipments are damaged frequently, and some suggest that rail boxcar rates should be differentially lower than sea-land rates to offset the expense and inconvenience resulting from loss and damages on rail shipments. Many other shippers do not consider loss and damage as a factor in determining the mode of transportation.

[309 I. C. C. 603] So-called damage-free and compartmentalized cars are available to shippers in railroad service to a limited extent, and when these cars are used damages generally are negligible. Some shippers have found in using such special cars that their expenses of loading are increased. The higher purchase costs of such cars has deterred the railroads from investing their capital on a large scale in this type of equipment.

Stop-off privileges.—Some shippers use railroad stop-off privileges frequently. A number of shippers use all-motor or all-rail service because of the availability of stop-off arrangements, such as storage, diversion, and milling in transit. The sea-land service provides stop-off privileges in connection with the land portions of the service. Some shippers consider the sea-land service to be more flexible than all-rail service, in that three sea-land deliveries are permitted in a given city with no penalty other than the stop-off charges. The rail stop-off charges are \$18.09 in official territory, and \$16.20 in the Southwest, compared with a sea-land stop-off charge of \$13.

A traffic study by the rail carriers for the period of December 2 to 6, 1957, inclusive, of shipments from northeastern states to southern and southwestern states shows that out of 1,326 cars, 122 were stopped for partial loading or unloading, and of these only 12 cars, or less than 1 per-

cent, were stopped in intermediate territory beyond the reach of sea-land competition.

Other value-of-service considerations.—One of the principal considerations in the shipper's determination of the value of water-carrier service is the uncertainty due to the perils of the sea. Lower minimum weights available in some instances in sea-land service and higher minima in railroad service will at times result in different inventory costs for some shippers. Also, in rail service there are extra charges for protective services against heat and cold, whereas in sea-land service such charges are included in the sea-land rates.

The railroads can handle oversized freight, whereas sea-land trailers are limited to articles about 34 feet long, and there are State highway weight limitations for trailers. So far as appears, little or none of this oversized freight is moving in the areas in which sea-land competes.

GENERAL DISCUSSION AND CONCLUSIONS.

Only the sea-land rates of Pan-Atlantic are under investigation herein. That carrier urges that it cannot exist without differential rates; that is, rates lower than all-rail and all-motor rates. The railroads urge that, regardless of whether we approve or disapprove the new sea-land rates, there should be no order which would require a fixed relation between the sea-land and the all-rail rates.

[309 I. C. C. 604] In I. & S. Docket No. 6847, the protestant, Southern Motor Carriers Rate Conference, Inc., requests findings that Pan-Atlantic has failed to establish that the proposed level of sea-land rates on frozen citrus juice concentrates is necessary for Pan-Atlantic fairly to compete with motor common carriers; that the motor common carriers depend for their very existence upon this traffic and will lose substantial tonnage to Pan-Atlantic through these rate reductions; that Pan-Atlantic will create destructive competition, with resulting needless and

wasteful dissipation of common-carrier revenues; and that Pan-Atlantic has failed to establish that the proposed rates are reasonably compensatory. In its exceptions to the proposed report, these requests are reiterated. This protestant, however, presented evidence which deals only with its rates at lower minima than those of the respondent, and the injury claimed is not established on this record.

The protestant rail carriers except to the Cost Finding Section's selection of rail mileages and to the examiner's failure to adopt that section's suggestion as to the respondent's separation of accounts in its annual reports. Neither exception concerns matters of such weight as to affect the decision herein. Pan-Atlantic restates its contention for a differential under the all-rail rates, and excepts to certain factual interpretations by both the hearing examiner and the Cost Finding Section. The instant report clarified these interpretations.

The sea-land rates here in issue, with the exceptions previously noted, appear to be reasonably compensatory. The remaining question is whether they are unlawful because of their effect on competitive rates of other modes of transportation.

Section 307(f) of the act provides that in prescribing just and reasonable rates by water, we shall give due consideration, among other factors, to the effect of the rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable water carriers, under honest, economical, and efficient management, to provide such service. The wording of this paragraph is substantially similar to that in sections 15a(2) and 216(i) of the act.

Section 15a(3) of the act provides, in part, that the rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation,

giving due consideration to the objectives of the national transportation policy; and section 305(c) provides that differences in the rates of a water carrier with respect to water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to [309 I. C. C. 605] constitute an unfair or destructive competitive practice. Also, the national transportation policy provides, among other things, that the provisions of the Interstate Commerce Act shall be so administered as to recognize and preserve the inherent advantages of each mode of transportation.

The sea-land rates under investigation herein, in general, are lower than the corresponding rail rates by lesser amounts than the rates formerly maintained in connection with Pan-Atlantic's break-bulk service. At the same time, Pan-Atlantic's costs of operation under its sea-land service are from \$10 to \$12 a ton less than the costs under its break-bulk service. Accordingly, Pan-Atlantic urges that protestants which contend that its rates should be higher are in the anomalous position of asking that it be required to charge the shipping public more for a service which is less expensive to perform, thereby discouraging increased transportation efficiency and depriving the shipping public of the advantages of improved transportation methods. It asserts that it should not be required to charge rates higher than its operating costs for the sole purpose of protecting the revenues of competing carriers.

On some traffic, particularly port-to-port traffic and certain other traffic subject to the higher single-trailer minima, Pan-Atlantic is the low-cost agency; on other traffic, the railroads' costs are lower than those of Pan-Atlantic. However, we do not have before us either the rail or sea-land costs as to many of these rates, and there is a complete absence of any all-motor costs. Moreover, as above discussed, other considerations enter into the factor of inherent advantages. For these reasons, we cannot determine on this record where the inherent advantages may lie as to each commodity, and still less as to each particular rate. Also,

it is well established that cost is only one of the elements which must be considered in passing upon the lawfulness of rates. In these circumstances, our determination here should not rest solely upon differences in the operating costs of the respective modes competing for this traffic.

Having determined that, with the few exceptions noted, the proposed rates are reasonably compensatory, the next most important consideration is whether these rates are lower than necessary to attract some of this traffic to the sea-land service. As stated, the evidence indicates that the sea-land service generally must have rates lower than those by rail in order to attract any substantial volume of this traffic; also that the proposed rates are no lower than necessary for that purpose. Historically, on coastwise traffic the rates between eastern territory and Gulf ports have long been on a lower level generally than the corresponding all-rail rates. As stated in *Deming Rates from Eastern Ports to the Southwest*, 264 I. C. C. 551, 559:

[309 I. C. C. 606] The steamship lines plying between north Atlantic and Gulf ports must, in order to operate successfully, participate in the handling of traffic to and from interior points. In order to participate in such traffic, the rates over such lines must be on a lower level than those over all-rail routes.

Moreover, section 307(d) of the act, in authorizing the Commission to establish through routes and joint rates in connection with water and rail carriers, provides that "where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water." While that provision is not controlling here, where the proposed rates, voluntarily established, apply in connection with motor carriers and a water carrier, it appears indicative of the Congressional intent that, where necessary to permit an essential, efficiently operated water carrier to

participate in the economical movement of traffic, the service in connection with the water carrier should be accorded some advantage in the form of lower rates. There is, of course, a limit beyond which Pan-Atlantic cannot be expected to attract sea-land traffic at economical rates. We are satisfied that the proposed rates, with the exceptions noted, generally do not go beyond that limit.

There is indication that if the proposed rates are approved, the all-rail carriers intend to counter with reduced rates of their own. In such event, they should take into account the effect thereof upon the national transportation system and the implications of the national transportation policy, consideration of which is required by the established rules of rate making.

From the evidence presented, it is concluded that the proposed rates, except as indicated below, are not unlawful.

We find that 11 of the rates under investigation, on the commodities from and to the points shown in footnote 7, are not shown to be just and reasonable, and that the other rates here under investigation are lawful. An order will be entered requiring the cancellation of the rates found not shown to be lawful, and discontinuing the proceedings.

COMMISSIONER MCPHERSON *concurs in the result.*

COMMISSIONER FREAS, *dissenting in part:*

Although there is a substantial record, it does not depict in detail all of the facts and circumstances surrounding each of the approximately 469 reduced commodity rates

7. Shipping carriers (empty barrels and bottles) from Daytona Beach to Philadelphia; canned goods from New Orleans to Baltimore and Rochester, from Gulfport to Philadelphia, and from St. Francisville to Miami; pulpboard from Bogalusa to New York, and from Kreole to New Brunswick, Wharton, and New York; and synthetic plastics from Baton Rouge to Baltimore and Rome.

here before us. Thus, the [309 I. C. C. 607] making of express findings as to each and every one of these rates is wholly impracticable.

Of vital importance in situations of this nature are the relative cost and service advantages and disadvantages of the contending carriers. These, according to the record, at times favor one form and at times the other. As the report points out, "On some traffic, particularly port-to-port traffic and certain other traffic subject to the higher single-trailer minima, Pan-Atlantic is the low cost agency; on other traffic, the railroads' costs are lower than those of Pan-Atlantic." How much falls in either of these categories cannot be precisely determined. Appendix A shows that on an out-of-pocket basis respondents are the low-cost carriers in but two of nine instances and on a fully-distributed basis in but three. It seems clear that the instances in which the railroads are the low-cost mode at least equal those in which Pan-Atlantic occupies that position. Service advantages and disadvantages are similarly distributed so that a general finding that the inherent advantages on the traffic are with any particular mode of transportation cannot be supported on this record.

Excepting in eleven instances, the majority approves differentially lower water than rail rates. Were it shown that service considerations were equal and that respondents were the low-cost form of transportation to the extent at least of these differentials, I would not disagree with such findings. However, except as a means of protecting the high-cost form of transportation, I cannot understand approval of differentials under the rail rates in those instances in which respondents are the high-cost mode.

That water transportation may need protection is not here controlling. It is for the Congress to provide special relief if a necessary form of transportation requires it; it is for us to deal ratewise with all modes in accordance with the standards given us by the Congress.

Approval of a differential to protect the high-cost form of transportation clearly does not comport with the provi-

sions of section 15a(3) of the Interstate Commerce Act, nor with the express provisions of the National Transportation Policy. While that Policy is cited in the report, I do not understand that it is contended that it by its express terms authorizes the fixing of a differential under the circumstances here. Rather, the statutory basis for the report seems to rest upon a construction of section 305(c) of the Act which reads in part:

Differences in the * * * rates, * * * of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

[309 I. C. C. 608] To me this means that the mere fact of a difference shall not be taken to constitute unfair or destructive competitive practices. I find nothing to suggest that the Congress intended to immunize water carriers against charges of unfair or destructive competitive practices in all instances in which their rates are lower than those of the rail lines. Indeed, under such a construction there could not be any unfair or destructive competitive practice by water carriers, regardless of how far they reduced their rates or to what purpose.

In view of the foregoing, I can view the approval of a differential for the high-cost form of transportation in no other light than as "umbrella ratemaking," a practice which it is my understanding the Congress does not wish us to pursue and one which the Commission has said it does not sanction.

This much in explanation of my differences with the majority—there remains to be discussed what course should be followed. First, we should set forth as fully and clearly as is practicable our views as to the guiding principles in such situations. Since it is not practical on this record to apply those standards to each and every one of some 469 proposals and since the burden under the Act is on the

respondents, we should require the cancellation of these rates without prejudice to the refile of any that respondents believe conform to the standards we have set forth. This to me seems to be the only practical course and one that deals fairly with all concerned. The rates are now in effect and by allowing a reasonable time within which cancellation is to be made, respondents could make the new filings before the present rates were canceled, thus in no way disturbing the rate situation in instances which are justified. On the other hand, should respondents include, either inadvertently or because of intentional differences, rates which do not comport with the standards set forth, those rates would be subject to suspension and investigation.

The guiding principles to which reference has been made should in my opinion be as follows: Assuming substantial equality in service and an absence of special circumstances, respondents should be permitted to meet their competitors' rates whenever they can do so at rates that are compensatory. They should not be permitted to go below their competitors' rates unless they show that (1) rates lower than those of competing carriers are above respondents' full costs and that (2) respondents comprise the low-cost form of transportation. The second requirement is necessary only to prevent the high-cost form of transportation from undercutting the low-cost forms in instances where a rate of the low-cost form which exceeds full costs is nevertheless just and reasonable. Where services are unequal, the greater value to shippers of the more desirable service should be reflected in the rate relationship.

APPENDIX B

RATIONALE OF COST FINDING SECTION

Cost Finding Section's comments on Pan-Atlantic's cost studies and criticisms:

Respondent stated that its own costs were all inclusive. However, the record does not provide the basic data to verify this statement, and respondent's annual report does not show the expenses for the sea-land service separately from the total expenses for all services operated by Pan-Atlantic. The Commission should require that this separation with a proper allocation of overhead expense to the sea-land service and appropriate statistics be shown in respondent's annual report to the Commission so that in any future proceedings involving sea-land costs the basic expenses used by respondent may be verified. The costs were based on a 14-day round voyage covering 4 ports. Commencing at Houston, a vessel would stop at Tampa, Port Newark, Miami, and then return to Houston. Costs based on this operation were applied to voyages which included stops at New Orleans, Mobile, Philadelphia, and Jacksonville. According to the schedule introduced in I. & S. No. M-10698, exhibit 1, appendix X, two different sets of voyages are now in operation. One schedule provides for direct service between Port Newark and Houston with no intermediate stops. Another schedule provides service from Port Newark via Miami to New Orleans and return via Tampa to Port Newark. Both schedules provide for a 14-day round trip. The effect of the change in schedules on the consist of traffic and costs is not shown in the record.

In developing the vessel expenses respondent failed to provide a separation of expense between the time the vessel was in port and the time the vessel was at sea, but instead related all vessel expenses directly to ton-miles. This treatment results in understating the costs for shorter-than-average hauls and in overstating the costs for longer-than-

average hauls. From data available in the underlying working papers, it appears that for the 14-day voyage used for developing the costs, the time in port amounts to about 19 percent of the total. Where additional stops would be made this percentage would be even greater. The cost for the time in port should have been related to the number of loaded vans handled. The cost for the vessel while at sea should have been related to the loaded van-miles rather than the ton-miles in order for the final costs to reflect properly the different weight loads in each van.

Respondent used a factor of 75 percent for developing its vessel and port out-of-pocket expenses based on the utilization of the vans per voyage at the time of the cost study. Respondent feels that 100 percent of maximum practical utilization would be possible without additional vessel expense, and that, therefore, the 75 percent level of cost reflects what the cost would be if a 100 percent level of maximum practical utilization were reached. Respondent fails to recognize the fact that if the traffic available were to double, additional vessels would be required. Thus, over a long period the vessel costs would vary almost directly with traffic volume. In the absence of evidence justifying the use of a load factor greater than that actually experienced on the 5 test voyages, it is believed that the cost should be based on the loads actually experienced rather than on 100 percent of maximum practical utilization, which is reflected by use of the factor of 75 percent. Because data necessary to determine the out-of-pocket cost of vessel and port operations are not available, the Cost Finding Section believes that the direct expense before the addition of overhead is justified for use as an out-of-pocket level, and this has been used in the restatement of respondent's water costs by the Cost Finding Section.

[309 I. C. C. 611] Respondent used the ratio of general overhead to direct expenses based on operations of both Pan-Atlantic and Waterman Steamship companies combined. Although the overhead expenses may not be readily

separable as between the two companies and for the sea-land operations specifically, the proper amount of overhead to be allocated to the sea-land service can be obtained by special studies. In view of the unique type of operation represented by the sea-land service, it would seem that the latter procedure would be preferable to the use of an overall overhead ratio.

Respondent shows the cost of depreciation and interest on the cargo vans separately for refrigerator vans and general cargo vans, but it does not show the additional expense of operating the refrigerator vans either while in the terminal or on board the ship. Although such an expense is included in the total cost and apparently spread over all traffic, it would be preferable to reflect this expense separately.

Although respondent contends that it is its practice to top load those vans with less than average weights per shipment, it should be apparent that this is not always possible or practicable to do. For example, in the case of frozen foods or in the case of radios and television sets or other low density freight, it is unlikely that top loading would be practicable or even possible. A witness for the respondent testified that at Jersey City 35 percent of the local sea-land pickups of truckload freight received additional loading at the terminal, one truckload or volume shipload was handled per van, and that top loading consisted of less-truckload freight. So far as the Jersey City terminal is concerned, it would appear that in some instances it would be practicable to top load a volume shipment with another volume shipment, in which case, an allowance for platform handling shall be included.

In its restatement of respondent's costs the Cost Finding Section has given recognition to the fact that top loading of some low-weight truckload shipments is practiced by respondent. Where such additional loading has been considered to be feasible the average load experienced by respondent of 36,000 pounds has been used for computing the water line-haul cost, instead of the minimum weight per shipment

for shipments under 30,000 pounds. The average load of 36,000 pounds is used for all items where allowance is made for top loading because the record does not provide the average loads at which the various commodities actually moved. Allowance for heavier loading based on the latter information would be preferable. For those items where heavier loading would appear to be possible but where comparative rail costs have been computed for the same or approximate minimum weight per shipment, the water line-haul cost has been based on the minimum weight per shipment in order to provide comparability with the rail costs.

Respondent also contends that the connecting motor carriers top load the lighter weight shipments. The degree to which this may be practiced is not shown in the record. Therefore, in its restatement of respondent's connecting motor-carrier line-haul costs, the Cost Finding Section has based those costs on the minimum weight per shipment weighing up to 40,000 pounds. In its treatment of pickup and delivery expense respondent assumed an average weight of 36,000 pounds in many instances for shipments weighing in excess of 40,000 pounds, the maximum capacity of a van. This ignores the pickup or delivery cost for the remaining weight of the shipment. The Cost Finding Section believes that where a pickup or delivery cannot be made by the use of one cargo van, the pickup or delivery weight should be based on the weight of the shipment divided by the least number of cargo vans required to pro- [309 I. C. C. 612] vide such service. Thus, a 50,000-pound shipment would require two vans and the pickup or delivery service would be costed at 25,000 pounds.

In the Cost Finding Section's restatement of respondent's costs, the interchange expense for the connecting motor carriers has been computed at 50 percent of the pickup or delivery expense, as was done by respondent originally, rather than at 25 percent which respondent used in its revised cost presentation. In the absence of evidence developing the computation of the 25 percent factor, the

Cost Finding Section believes the factor of 50 percent to be representative of the relationship of interchange to pickup or delivery expense for truckload shipments.

In its brief respondent contends that the all-rail costs, including those introduced by respondent, should not be compared directly with the sea-land costs because:

1. All-rail costs and sea-land costs are based on different periods.

2. All-rail costs are based on territorial averages while sea-land costs reflect specific conditions. Use of territorial average rail costs understates terminal expense for the large metropolitan areas.

3. Sea-land costs are affected by, among other things, the amount of connecting motor-carrier haul and the presence and existence of a back-haul in the connecting-carrier movement.

4. At the higher weights, the method of operation between sea-land and rail is radically different.

The Cost Finding Section believes that all-rail costs are capable of being compared directly with the sea-land costs for the following reasons:

1. The record shows that respondent adjusted the rail costs to a January 1, 1958 level of wages and prices to provide comparability with the sea-land costs computed for a 1957 level.

2. If respondent believed the rail terminal costs for the large metropolitan areas to be understated it should have endeavored to adjust the costs for such understatement. The large rail terminals are involved in many of the comparative all-rail movements, but there are also many movements involving small and medium size terminals. If costs are to be adjusted upward for the large terminals, they should be adjusted downward for the small terminals.

3. The fact that sea-land costs are affected greatly by the length of connecting motor-carrier hauls and by back hauls of the connecting motor carriers is a natural result of this type of operation. The fact that the rails do not share the same disabilities is no reason that the costs should not be compared.

4. The costs for higher weight shipments reflect the operating conditions or advantages for each mode of transportation. Because the railroads are able to obtain twice the weight load or more in a boxcar that can be loaded in a sea-land van without substantially increasing the cost is no reason why direct comparison of costs is invalid.

Cost Finding Section's comments on protestants' cost studies and criticism:

The out-of-pocket level of expense for the water movement has been discussed previously herein. In reply to protestants' use of 5 later voyages for computing water costs, respondent stated that there were 4 even later voyages which operated in excess of 75 percent loaded and that the average for the 14 voyages, excluding the 5 used by respondent, amounted to 75.5 percent, which is roughly the same as the average of the voyages used by respondent. Considering the above facts, respondent's use of the original 5 voyages for development of the tonnage handled is considered to be proper. Respondent has shown the fuel cost at sea to be considerably different from the fuel cost in [309 I. C. C. 613] port, and protestant is in error in not reflecting the difference in this cost. Tests made by respondent and based on actual operating experience show that an allowance for overtime of 45 percent, rather than 50 percent used by protestants, is proper.

In view of the fact that the Pan-Atlantic costs were based on operations in the latter part of 1957 and motor-carrier costs were adjusted to a 1957 level, protestants' contention that rail costs as of January 1, 1957, are proper

APPENDIX A

RATES, COSTS, AND COST RATIOS

Rates and costs in cents per 100 pounds; ratios in percents; minimum weights in 1,000 pounds; SL is Sea-Land; OP is out-of-pocket; FD is fully distributed; PA is Pan-Atlantic; MC is motor carrier; AR is all-rail

	Origins and Destinations	Sea-Land		OP Costs			FD Costs			Ratios SL Rates to Costs		All-rail Rate and Costs				Ratios SL to AR Costs	
		Min.	Rate	PA	MC	Total	PA	MC	Total	OP	FD	Min.	Rate	OP	FD	OP	FD
Frozen fruit concentrates	Dade City, Fla., to Boston, Mass.	¹ 36	159	55.2	53.7	108.9	63.9	79.9	143.8	146	111	36	168	171.1	199.3	64	72
		¹ 80	141	55.2	53.7	108.9	63.9	79.9	143.8	129	98	120	145	65.3	93.5	167	154
Citrus pomace without syrup	Tampa, Fla., to Boston, Mass.	40	106	52.0	39.6	91.6	60.2	55.5	115.7	116	92	40	112	90.9	120.2	101	96
		² 80	92	52.0	39.6	91.6	60.2	55.5	115.7	100	80	60	97	67.1	96.4	137	120
Synthetic plastics	Baton Rouge, La., to Berlin, Conn.	³ 70	128	58.4	41.8	100.2	67.6	62.9	130.5	128	98	70	133	64.4	95.7	156	136
		40	161	51.1	38.4	89.5	59.2	59.5	118.7	180	136	—	—	—	—	—	—
Aluminum articles	Massena, N. Y., to Dallas and Fort Worth, Tex.	30	228	73.8	119.7	193.5	85.5	157.8	243.3	118	94	30	241	142.6	180.2	136	135
		40	214	55.7	98.3	154.0	64.5	136.4	200.9	139	107	40	208	112.5	150.0	137	134
Coffee	Freehold, N. J., to Jacksonville, Fla.	30	124	49.7	71.7	121.4	57.5	100.3	157.8	102	79	30	131	84.9	107.5	143	147
Copper rods	Bayway, N. J., to Tampa, Fla.	40	129	64.6	—	64.6	74.8	—	74.8	200	172	50	140	75.9	100.3	85	75

Weights Used in Computing Costs:

¹ 35,000 pounds used because of maximum load per trailer in refrigerated vans in New Jersey—Docket I. & S. No. 6985.

² 40,000 pounds used as load per trailer when two trailers used for 80,000 pounds.

³ 35,000 pounds used as load per trailer when two trailers used for 70,000 pounds.

is difficult to justify. The fact that protestants subsequently introduced rail costs for I. & S. No. M-10698 based on I. C. C. Statement No. 2-58, which reflect a level for wages and prices as of January 1, 1958, would tend to nullify the contention that the costs for the earlier period were appropriate. As noted previously, respondent also restated the rail costs for the movements in I. & S. No. M-10415 et al. based on Statement No. 2-58. Unfortunately, it did not do so for the movements in I. & S. No. M-10698. Protestants' rail costs in I. & S. No. M-10698 are deficient in that the fully-distributed expenses are shown for only a limited number of items. Therefore, in order to provide both out-of-pocket and fully-distributed costs for all items in its own restatement of respondent's costs, the Cost Finding Section has used the rail costs from respondent's exhibit 123 in I. & S. No. M-10415 and from exhibit 7 in I. & S. No. M-10698. Although protestants' rail costs in I. & S. No. M-10698 are somewhat lower than those shown by respondent, the difference is not considered enough to affect greatly the comparative results. Protestants' rail costs are further deficient in that they do not include allowance for loss and damage claim payments.

Respondent acknowledged that the use of Pocahontas region costs were proper for movements through that region and used such costs in its restated exhibit. In reply to protestants' contention that rail costs should be based on maximum possible loads, respondent introduced an exhibit based on Interstate Commerce Commission waybill studies for the year 1956, which showed actual loads per car to be considerably less than the maximum loads shown by protestants. The use of maximum possible loads for costing purposes has little value as it is the actual load at which the traffic moves that determines the cost per 100 pounds.

Concerning the representativeness of the motor carriers used in its cost study, respondent stated that it computed costs for the principal motor carriers which handle sealand traffic, although one of the larger connecting carriers

was omitted because adequate cost data were not available for that carrier. Respondent admitted that costs for carriers handling frozen food would be somewhat higher than those for general commodities, but stated that the difference in cost would not be large enough to change the results of the study because the revenues from the frozen food traffic greatly exceed the costs. As a rough indication of what the increased cost of frozen foods would be, based on total expense per vehicle-mile, respondent computed the overall expense per vehicle-mile for 5 carriers of refrigerated food to be 35 cents. This amount is 4 cents per vehicle-mile greater than the average line-haul cost alone of 31 cents per vehicle-mile for the 25 carriers used in respondent's cost study. The actual cost per vehicle-mile would be somewhat less because the 35-cent figure includes terminal cost as well as line-haul cost. Although respondent should have included an allowance for the cost of operating the refrigerated vans while in possession of the motor carriers, the Cost Finding Section believes that the motor-carrier costs used by respondent in its cost presentation are sufficiently representative for the purposes of these proceedings.

Order

At a Session of the INTERSTATE COMMERCE COMMISSION,
Division 3, held at its office in Washington, D. C. on the
10th day of February, A. D. 1960.

INVESTIGATION AND SUSPENSION DOCKET No. M-10415
COMMODITIES—PAN-ATLANTIC STEAMSHIP CORPORATION

INVESTIGATION AND SUSPENSION DOCKET No. M-10430
ADIPIC ACID—BOUTTE & LULING, LA., TO EAST

INVESTIGATION AND SUSPENSION DOCKET No. M-10431
COMMODITIES—SEA-LAND—LOUISIANA TO EAST—
P. A. S. S. Co.

INVESTIGATION AND SUSPENSION DOCKET No. M-10434
VARIOUS COMMODITIES—N. J., N. Y. & PA. TO FLA. & TEXAS

INVESTIGATION AND SUSPENSION DOCKET No. M-10437
PULPBOARD-FIBERBOARD—EVADALE, TEX., TO NEW YORK, N. Y.

INVESTIGATION AND SUSPENSION DOCKET No. M-10469
ALUMINUM ARTICLES—MASSENA, N. Y., TO TEXAS

INVESTIGATION AND SUSPENSION DOCKET No. M-10582
VARIOUS COMMODITIES, SEA-LAND, EAST TO FLA., LA., TEX.

INVESTIGATION AND SUSPENSION DOCKET No. M-10599
PAPER—SOUTH TO N. Y. AND N. J.

INVESTIGATION AND SUSPENSION DOCKET No. M-10602
COMMODITIES—EAST TO ALA., FLA., AND TEXAS

INVESTIGATION AND SUSPENSION DOCKET No. M-10624
FOODSTUFFS—LA. AND MISS. TO CONN., MD., MASS.,
N. Y., PA., AND R. I.

INVESTIGATION AND SUSPENSION DOCKET No. M-10679
FEED—FLORIDA TO NEW ENGLAND AND TRUNK LINE TERR.

INVESTIGATION AND SUSPENSION DOCKET No. M-10698
SEA-LAND—PAN-ATLANTIC S. S. CORP.—PLASTICS
& WIRE CLOTH

INVESTIGATION AND SUSPENSION DOCKET No. M-10716
BRUSHES—CONN., MASS., AND N. Y. TO TEXAS

INVESTIGATION AND SUSPENSION DOCKET No. M-10721
VARIOUS COMMODITIES—PAN-ATLANTIC STEAMSHIP
CORPORATION

INVESTIGATION AND SUSPENSION DOCKET No. M-10722
SEA-LAND—VARIOUS COMMODITIES—P. A. S. S. Co.

INVESTIGATION AND SUSPENSION DOCKET No. M-10825
COMMODITIES—PAN-ATLANTIC SEA-LAND SERVICE

INVESTIGATION AND SUSPENSION DOCKET No. M-10945
COMMODITIES—PAN-ATLANTIC STEAMSHIP CORP.

INVESTIGATION AND SUSPENSION DOCKET No. M-10946
COMMODITIES—EAST, SOUTH & SOUTHWEST

INVESTIGATION AND SUSPENSION DOCKET No. M-10963
VARIOUS COMMODITIES—PAN-ATLANTIC SEA-LAND SERVICE

INVESTIGATION AND SUSPENSION DOCKET No. 6847
FRESH OR FROZEN FOODS—SEA-LAND—PAN-ATLANTIC
S. S. CORP.

INVESTIGATION AND SUSPENSION DOCKET No. 6848
PAPER—ALA. TO FLA. AND FLA. TO TEXAS

INVESTIGATION AND SUSPENSION DOCKET No. 6870
ALUMINUM & PETROLEUM—TEXAS & LA. TO FLORIDA

INVESTIGATION AND SUSPENSION DOCKET No. 6894
COMMODITIES—PAN-ATLANTIC, FLA., LA. & TEXAS

INVESTIGATION AND SUSPENSION DOCKET No. 6985
FROZEN CITRUS PRODUCTS—FLORIDA TO OFFICIAL
& NEW ENGLAND PORTS

It appearing, That by orders in the above-entitled proceedings the Commission entered upon investigations concerning the lawfulness of the rates, charges, regulations, and practices stated in certain schedules described in said orders and suspended the operation of the schedules for a period of seven months, said schedules now being in effect;

It further appearing, That a full investigation of the matters and things involved has been made, and that said division, on the date thereof, has made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel the said schedules, to the extent found not shown to be lawful in the said report made a part hereof, on or before March 22, 1960, in the manner prescribed by the Commission under the Interstate Commerce Act, and that these proceedings be, and they are hereby, discontinued.

By the Commission, division 3.

HAROLD D. MCCOY,
Secretary.

(SEAL)

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 6834¹

PIGGY-BACK RATES—BETWEEN EAST AND TEXAS

Decided

1. In I. & S. No. 6834, and F. S. A. No. 34227, proposed reduced trailer-on-flat-car rates on numerous commodities between points in Official Territory, on the one hand, and, on the other, Dallas and Ft. Worth, Tex., found unjust and unreasonable in certain instances, and in other instances, found lawful; and fourth-section application for relief, in connection with rates found unjust and unreasonable, denied, and in connection with rates found lawful, granted. Rates found unlawful ordered canceled, and proceeding discontinued.
2. In No. 32313, sea-land rates except one of Pan-Atlantic Steamship Corporation, and rail-water-rail rates of Seatrain Lines, Inc., on numerous commodities from origins in the east to Dallas and Ft. Worth, Tex., found not shown to be unjust and unreasonable. Unlawful rate ordered canceled and proceeding discontinued.

Edwin N. Bell, James A. Bistline, J. P. Canny, Robert P. Falet, John P. Ganly, Ernest D. Grinnell, Jr., Carl Helmetag, Jr., Bernard Hulkower, Eugene E. Hunt, William Q. Keenan, Howard D. Koontz, Donald McDevitt, J. Edgar McDonald, Léo H. Pou, Clarence Raymond, Charles P. Reynolds, Albert B. Russ, Jr., Walter G. Treanor, and R. S.

1. This report also embraces Docket No. 32313, Commodities—Pan-Atlantic—Between East and Texas, and fourth-section application No. 34227, Trailer-On-Flat-Car Service Between Official Territory and Dallas-Fort Worth, Tex.

Trigg, for rail carriers, respondents in I. & S. No. 6834, applicants in fourth-section application No. 34227, and interveners in opposition in No. 32313.

William H. Armbrecht, L. A. Parish, and Warren Price, Jr., for Pan-Atlantic Steamship Corporation and motor carrier participants in Pan-Atlantic tariffs, respondents in No. 32313, and protestants in I. & S. No. 6834 and fourth-section application No. 34227.

S. S. Eisen for Seatrain Lines, Inc., respondent in No. 32313, and protestant in I. & S. No. 6834 and fourth-section application No. 34227.

Charles W. Bucy and Leonard M. Shinn for the Secretary of Agriculture of the United States, intervener in support of protestants in I. & S. No. 6834, and in support of respondent, Pan-Atlantic, in No. 32313.

Ernest M. Sharp for the Houston Port Bureau, Inc., *Arthur L. Winn, Jr., Samuel H. Moerman, and Walter J. Myskowski* for the Port of New York Authority, *James J. Fisher*, Port Agent for the City of Providence, and *Louis A. Schwartz* for the New Orleans Traffic and Transportation Bureau, protestants in I. & S. No. 6834 and fourth-section application No. 34227, and interveners in support of respondent, Pan-Atlantic, in No. 32313.

James E. Haydon for the Eastern Central Motor Carriers Association, Inc., protestant and intervener in opposition to all of the respondents.

Report Proposed by Charles E. Morgan, Hearing Examiner

By schedules filed to become effective November 14, 1957, and later in I. & S. No. 6834, the rail carrier respondents proposed to establish new reduced rates listed in 27 tariff items on numerous commodities in trailer-on-flat-car

(TOFC) service between² points in the East, on the one hand, and, on the other, Dallas and Ft. Worth, Tex. Upon protest thereto, the operation of the schedules was suspended to and including June 13, 1958. The effective date of the proposed schedules has been postponed voluntarily by the rail carriers, and the proposed TOFC rates have not gone into effect.

By their fourth-section application No. 34227, the rail carriers, respondents herein, are applicants for fourth-section relief, seeking authority to establish and maintain the above proposed TOFC rates without observing the long-and-short-haul provisions of section 4 of the Interstate Commerce Act. The rail carriers propose to continue to maintain certain higher rates to and from intermediate origins and destinations. The proposed TOFC rates and the application for fourth-section relief in connection therewith are opposed by the Secretary of Agriculture of the United States, the Pan-Atlantic Steamship Corporation, (called Pan-Atlantic), the Seatrain Lines, Inc., (called Seatrain), the Eastern Central Motor Carriers Association, Inc., (called Eastern Central), the Houston Port Bureau, Inc., the Port of New York Authority, the City of Providence and the New Orleans Traffic and Transportation Bureau. No shippers or receivers located at points intermediate to the origins and destination herein opposed the granting of fourth-section relief.

In No. 32313, by order dated November 8, 1957, of the Board of Suspension of the Commission, an investigation was instituted into the rates of Pan-Atlantic listed in 22 tariff items in connection with its sea-land service on numerous commodities from origins in the East to Dallas and Ft. Worth. Also in No. 32313, by first supplemental order dated December 18, 1957, of the Board of Suspension of

2. With one exception the proposed rates are southbound from points in the East to Dallas and Ft. Worth. There is one northbound rate on bags, cotton, new or old, etc., from Dallas and Ft. Worth to Baltimore, Md. This northbound rate also applies from and to other points taking the same rates as provided in the tariff.

the Commission, the investigation was broadened to include certain rates of Seatrain listed in 3 tariff items in connection with its rail-water-rail service from eastern origins to Dallas and Ft. Worth. The sea-land and Seatrain rates are opposed by the rail carriers and by Eastern Central.

The Pan-Atlantic and Seatrain rates are in effect and are under investigation only. The proposed TOFC rates were published by the rail carriers to reflect a parity with the sea-land rates. Since the sea-land rates are substantially the same as the Seatrain rates, the proposed TOFC rates also are substantially the same as the Seatrain rates. Since the railroads are parties to the Seatrain rates to the extent that such rates apply from inland points, the railroads are technical respondents in No. 32313, but the railroads are not defending the Seatrain rates.

It was agreed by the parties that the three proceedings herein be the subject of a single report, and that all of the evidence in the proceedings entitled, I. & S. No. M-10415, et al., *Commodities—Pan-Atlantic Steamship Corporation*, could be referred to in the present proceedings and to the extent relevant would be competent evidence herein. A proposed report has been issued in I. & S. No. M-10415, et al., and much of that report, such as its description of the sea-land service, is pertinent herein. Generally, the matters stated in the proposed report in I. & S. No. M-10415, et al., will not be repeated herein except where necessary for clarification or emphasis.

THE BACKGROUND OF THE TOFC AND OTHER RATES. The railroads published the proposed TOFC rates on a parity with the current rates for the sea-land service, upon the belief of the rail carriers that these two operations, which have many of the characteristics of overland motor carrier service, are, from a quality standpoint, equivalents, and that therefore in the absence of special circumstances they should be priced at the same levels. Generally, Pan-Atlantic and Seatrain contend that the water carrier services are entitled

to rates differentially lower than the rates of the overland carriers. Eastern Central takes the position that TOFC rates generally should be continued on the level of the motor common carrier rates, and that if TOFC rates are reduced that motor carrier rates also will have to be reduced. It is the view of Eastern Central that the railroads in their proposed TOFC service herein may not find it absolutely necessary to meet the exact Pan-Atlantic rates, and that the record may justify some differential of the Pan-Atlantic rates under the TOFC rates although a lesser, and more reasonable, differential than presently maintained.

Rail TOFC service between points in the southwest and points in the western part of Official Territory including Pittsburgh, Pa., was inaugurated on June 13, 1956. Later, on September 8, 1956, the Official Territory origins were extended to include points east of Pittsburgh. For this service rates were published generally on a parity with the prevailing motor carrier rates. When Pan-Atlantic inaugurated its sea-land service between the southwest and the east in the fall of 1957, the railroads were convinced that they could not compete in view of the fact that the sea-land rates were generally on the level of the Seatrain rates, whereas the TOFC rates were on the considerably higher level of the motor carrier rates.

The rail carriers decided to publish TOFC rates on the same level as the sea-land rates, but not between all origins and destinations. It was their intention to publish the TOFC rates herein from selected points in Official Territory to Dallas and Ft. Worth as a very limited pilot type of effort to meet the sea-land rates. A wholesale reduction in the TOFC rates not only would have disturbed competitive patterns between the railroads and the motor common carriers, but also would have created competition among the rail services, because the TOFC rates on the sea-land basis in many instances would be lower than the all-rail box-car rates.

Since the proposed TOFC rates were made applicable only to the destinations of Dallas and Ft. Worth, their publication created fourth-section problems. Avoidance of these problems would have entailed substantial reductions in rail revenues at intermediate points of origin and destination well outside of the sphere affected by the sea-land competition. To Dallas and Ft. Worth the railroads believe that competition compelled the proposed TOFC rates.

The general rate situation among the various carriers herein is illustrated by the rates on candy and confectionery. For example, from Naugatuck, Conn., to Dallas and Ft. Worth, the sea-land rate is 207 cents,³ minimum 36,000 pounds, and this is also the proposed TOFC rate. The Seatrain rate from and to the same points is 208.25 cents, minimum 65,000 pounds. The present all-rail box-car rate is 220 cents, minimum 36,000 pounds, and the corresponding all-truck rate in effect prior to December 9, 1957, is 284 cents, minimum 23,000 pounds.

As seen, the proposed TOFC rates, in reflecting parity with sea-land rates, thereby at times go below Seatrain rates. The sea-land rates are not always the same as the Seatrain rates, and there are differences also in the minimum weights. In part the differences between Seatrain and sea-land rates are caused by the variations in the application of general increases on the single-factor sea-land and commodity rates and on the combination rail-water-rail Seatrain rates. Where the Seatrain rates are competitive with the rates of the overland carriers, it is the intention of Pan-Atlantic to eliminate minor differences between its rates and the rates of Seatrain by adjusting the sea-land rates to the level of the Seatrain rates. In those instances where Pan-Atlantic does not consider the Seatrain rates to be competitive with the rates of the overland carriers, Pan-Atlantic intends to maintain differentials so that the sea-

3. Rates are stated per 100 pounds and include Ex Parte 206-A increases where applicable.

land rates are about 5 percent under the overland competitive rates.

THE COST EVIDENCE. Extensive cost evidence was submitted by the rail carriers and by Pan-Atlantic, and as requested by the parties this evidence has been considered by our Cost Finding Section, which has restated the TOFC costs and the sea-land costs. Necessarily, the restatement is too detailed to be reproduced in its entirety in this report, but it will be available for examination by the parties, and is shown in part in Appendix "A" hereto. The rationale of the Cost Section of the restatement of the TOFC costs is contained in Appendix "B" hereto. The rationale of the Cost Section concerning the restatement of the sea-land costs is the same as used in connection with the proceedings entitled, I. & S. No. M-10415, et al., and that rationale was appended to the proposed report in those proceedings, and it will not be repeated here.

THE SEA-LAND RATES. The sea-land rates herein as shown in the restatement, with one exception, exceed out-of-pocket costs, and they range as high as 258 percent of out-of-pocket costs. The one exception is the rate of 216 cents, minimum 20,000 pounds, on paint, etc., from Baltimore, Md., to Dallas and Ft. Worth, for which the restated out-of-pocket sea-land cost is 217 cents, or 1 cent more than the rate. By the usual standards, since this rate does not cover out-of-pocket costs, it should be considered as not compensatory and a finding should be made that it is unjust and unreasonable. There is no corresponding proposed TOFC rate, minimum 20,000 pounds. There are under investigation herein both a sea-land and a proposed TOFC rate on paint, etc., from Baltimore of 187 cents, minimum 36,000 pounds, which rate exceeds out-of-pocket costs by sea-land and by TOFC. Most of the sea-land rates herein also exceed fully-distributed costs.

The restated sea-land costs, both out-of-pocket and fully distributed, are below the restated TOFC costs for all movements of comparable weight as computed for railroad-owned flat cars, which cars in these proceedings have a capacity of a single trailer and are equipped with tie-down devices. In connection with flat cars, not presently owned, but leased by the railroads, which cars are designed to hold two trailers with special hold-down devices (called TTX cars), the restated sea-land costs are below the restated TOFC costs for all movements except two of the 66 movements listed in the restatement. It is concluded that, for the movements herein, generally sea-land is the lower cost service than TOFC.

Pan-Atlantic inaugurated its trailership service to and from Houston, Tex., in October, 1957. In sea-land service in 1957, there were shipments made in connection with 13 of the 22 Pan-Atlantic tariff items under investigation herein. No shipments were made at rates in 9 of these tariff items, and in connection with 7 of the 13 active items, there was a total of only 15 shipments. The record does not disclose the amount of traffic handled at rates in the other 6 active items, but on the whole the amount of traffic handled in sea-land service at rates in these 22 items in 1957, is considered by Pan-Atlantic to have been negligible tonnage-wise. The record does not show that any traffic has moved via Pan-Atlantic at rates as high as the competing rail rates, either all-rail boxcar or TOFC.

THE PROPOSED TOFC RATES. The proposed TOFC rates, as shown in the restatement of costs by the Cost Section, equal or exceed the restated out-of-pocket TOFC costs computed for hauls with so-called average circuitry (with mileage figures including the short-line distance between the origin and the Chicago and East St. Louis gateways and between these gateways and the destination, increased by 13 percent as an allowance for average cir-

cuity), for all listed movements by TTX cars, and for all but 6 of 66 listed movements by railroad-owned cars. The proposed TOFC rates equal or exceed the fully distributed costs for 43 movements by TTX cars and for 14 movements by railroad-owned cars. A greater number of trailers is carried on TTX cars than on railroad-owned cars.

The six movements in railroad-owned cars which do not return out-of-pocket costs are electric switch boxes from Newark, N. J., rate 240 cents, minimum 24,000 pounds, restated out-of-pocket cost 249 cents, ratio of rate to cost 96, foodstuffs from New York, N. Y., rate 222 cents, minimum 24,000 pounds, out-of-pocket cost 249 cents, ratio of rate to cost 89, laundry sour from Baltimore, Md., rate 169 cents, minimum 36,000 pounds, out-of-pocket cost 172 cents, ratio of rate to cost 98, laundry sour from Baltimore, rate 195 cents, minimum 24,000 pounds, out-of-pocket cost 236 cents, ratio of rate to cost 83, alcoholic liquors from Baltimore, rate 267 cents, minimum 20,000 pounds, out-of-pocket cost 276 cents, ratio of rate to cost 97, and alcoholic liquors from Philadelphia, rate 280 cents, minimum 20,000 pounds, out-of-pocket cost 283 cents, ratio of rate to cost 99.

On the movement of laundry sour from Baltimore in TTX cars at the rate of 195 cents, minimum 24,000 pounds, the out-of-pocket cost as shown in the restatement is 195 cents. Therefore, if only one shipment moved in railroad-owned cars, where the out-of-pocket cost is 236 cents, and other shipments moved in TTX cars at the cost of 195 cents, the result would be an overall failure to meet out-of-pocket costs. It is concluded that the TOFC rate of 195 cents, minimum 24,000 pounds, on laundry sour from Baltimore is not shown to be compensatory, and a finding should be made that it is not shown to be just and reasonable. Since the proposed TOFC rates are not in effect, it is not possible to estimate with any degree of accuracy the traffic which may move on any specific TOFC rate.

THE SEATRRAIN RATES. The investigation herein of Seatrain rates is limited to three commodity groups of rates, which are briefly described as linoleum, ammunition, and candy and confectionery. The first commodity group is more generally described as floor covering or related articles, including carpets, mats, rugs, coverings, and linoleum. The rates on linoleum under investigation herein range from 35.5 to 40.6 percent of the Docket-28300 first-class rail-water-rail rates. In Docket No. 31547, *William Volker & Company of Texas, Inc., et al. v. Central Railroad Company of Pennsylvania, et al.*, the complainants assailed the rail-water-rail rates on linoleum, including from and to the origins herein. By report and order therein of the Commission, decided February 3, 1958, 302 I. C. C. 757, it was found that the said rates for the future were unjust and unreasonable to the extent that they exceed the contemporaneous uniform classification basis. Rates in conformity with that order, on the basis of 35 percent of first class, were published effective May 15, 1958. These rates, now in effect, are on a basis lower than that reflected by the Seatrain rates on linoleum under investigation herein. Accordingly, this phase of the investigation of Seatrain rates is moot and should be discontinued.

The rates of Seatrain on ammunition under investigation herein are from Edgewater, N. J., to Dallas and Ft. Worth on traffic originating at Bridgeport and New Haven, Conn. These proportional rates, when added to the all-rail factors from origin to Edgewater, produce combination rail-water-rail rates to Dallas and Ft. Worth of 295 cents and 300 cents, minimum 40,000 pounds. These commodity rates alternate with higher rates, minimum 30,000 pounds, not here under investigation, which are based on exceptions to the class rates. The Seatrain commodity combination rates, minimum 40,000 pounds, are related to the corresponding all-rail commodity rates⁴ by lesser differentials

4. Reference to all-rail rates means to existing all-rail rates, and does not refer to the proposed TOFC rates.

than the Seatrain exceptions class rates are related to the corresponding all-rail exceptions class rates. The differential of 70 cents per 100 pounds of the rail-water-rail 30,000-pound rates under the corresponding all-rail rates results from the class rates prescribed or approved in Docket 13535. The commodity combinations, minimum 40,000 pounds, reflect differentials of 39 cents, or 56 percent, and 34 cents, or 49 percent, respectively from Bridgeport and New Haven, of the class rate differential.

During 1957, Seatrain obtained a total of 3 cars of ammunition from Bridgeport to Dallas and Ft. Worth, and no cars from New Haven. One of the three cars moved at the 30,000-pound rate and the other two cars at the 40,000-pound rate. Under the existing rates Seatrain participated in only a very small portion of the ammunition traffic. Obviously, if the ammunition differentials are replaced by rate equalization, Seatrain's competitive position will be worsened considerably.

The rates of Seatrain on candy and confectionery under investigation herein are from Edgewater, N. J., to Texas City, Tex., on shipments coming from specified origins in Connecticut, Massachusetts, New Jersey, New York, and Pennsylvania. These proportional rates when added to the all-rail factors to and from the ports produce combination rates subject to minimum weights of 50,000 and 65,000 pounds, which alternate with certain class rates, minimum 36,000 pounds.

The existing all-rail rates on candy and confectionery are exceptions class rates, minimum 36,000 pounds. They are lower than the rail-water-rail class rates, minimum 36,000 pounds. These all-rail rates are also lower than some of the Seatrain commodity combination rates, minimum 50,000 pounds. The Seatrain commodity combination rates, minimum 65,000 pounds, are lower than the existing all-rail exceptions class rates, minimum 36,000 pounds, by 5 cents at Camden, N. J., and Philadelphia, Pa., by 9 cents

at Boston, Cambridge, Malden, Mansfield and Milton, Mass., and Reading, Pa., by 11 cents at Naugatuck, Conn., and by 12 cents at Brooklyn, N. Y.

Of the fourteen origins for candy herein, in 1937, Seatrain obtained only a total of four carloads, each over 65,000 pounds, from Mansfield and none from the other origins. Thus, Seatrain participated in only a very small portion of the candy traffic. Obviously, if the candy differentials favorable to Seatrain are replaced by rate equalization, Seatrain's competitive position will be worsened considerably.

No evidence was introduced by Seatrain or by any of the other parties herein concerning the cost of the Seatrain service or the compensatory nature of its rates. While it was agreed by the parties as to the matter of procedure, that the annual reports of all parties might be referred to, and materials therefrom used without proof of authenticity, subject to objections as to relevancy and materiality only, no specific reference to the Seatrain reports was made at the hearing. On brief, Seatrain states that reference to its annual reports clearly depicts the compensatory nature of its existing rates under investigation herein. It is concluded that the Seatrain rates are not shown to be non-compensatory.

It is concluded further that on this record it cannot be determined which is the low cost carrier as between Seatrain and any one of the other carriers on specific traffic movements herein, because there are no studies of Seatrain costs for specific movements. Therefore, to the extent that the relationships of another carrier's costs to Seatrain's costs in part would justify findings as the necessity for, or appropriate measure of, differentials between the rates of Seatrain and the rates of another carrier herein, no such findings can be justified on this record.

WATER CARRIERS AND THE NATIONAL DEFENSE. Many coastwise water carriers have not resumed operations since World War II. Prior to that time there were about 19

deep-water common carriers operating in the Atlantic-Gulf coastwise trades, employing about 139 vessels. In 1940, these water carriers transported over 8,500,000 tons of cargo. Today, there are only two of these carriers operating in this trade, namely Seatrain and Pan-Atlantic, which operate, respectively, six and four vessels. Between 1939 and 1956, the tonnage handled by class I railroads in the United States increased 160.5 percent, and the tonnage handled by class I motor carriers increased 545.6 percent, but excluding bulk oil carried by Seatrain and Pan-Atlantic, the tonnage handled by water carriers in the Atlantic-Gulf coastwise trade suffered a decrease of 79 percent.

Pan-Atlantic estimates that Seatrain operating as at present with full capacity would transport about 1,000,000 net tons per year, and that Pan-Atlantic would transport about 800,000 net tons per year. The total for the two water carriers would be 1,800,000 net tons, compared with over 8,500,000 net tons transported by the water carriers in the same trade prewar.

The United States Maritime Administration stated in a 1955 review in part:

In short the crux of the coastwise-intercoastal shipping problem is in the break-bulk dry-cargo trade today as it was before the war. The re-establishment and preservation of this segment of the domestic fleet is of vital national defense importance if the immediate needs of a future grave national emergency are to be met. It is obvious that the ready availability of ships employed in domestic operations may well be a critical factor in any initial military or civil defense operation of the United States occasioned by a future atomic or thermo-nuclear war.

Further, an economically sound, low-cost domestic fleet will continue to make important contributions to the economic growth and development of the United States as a whole and a balanced national transportation system in particular.

Traditionally water rates, including water-rail and water-motor rates, have been maintained at levels differentially lower than all-rail rates, principally because of the inherent disadvantages in the water services of uncertainty (perils of the sea), slower transit time, and infrequency of sailings. The last major consideration of the rates of the Atlantic-Gulf coastwise water carriers was in the *Class Rate Investigation, 1939*, Docket 28300, 286 I. C. C. 5 (1952). Therein the Commission prescribed maximum reasonable first-class rates on ocean-rail traffic, also maximum reasonable percentage relations of the lower classes to first class, between North Atlantic ports and interior points in eastern seaboard territory, on the one hand, and, on the other, New Orleans and Baton Rouge, La., Texas Gulf ports, and interior points in the southwest. These prescribed maximum class rates were designed to preserve the then existing differentials of the ocean-rail rates under the all-rail rates. The maximum water rates prescribed therein were applicable exclusively to the Seatrain nonbreak-bulk service, and to the ocean-rail break-bulk water services of Pan-Atlantic, and Newtex Steamship Company, a line which resumed operations in the post-World-War-II period in the coastwise trade, but which ceased operating in 1956.

THE COMPARATIVE VALUES OF THE SERVICES. From the standpoint of the shipper, the TOFC service and the sea-land service are similar in that both provide door-to-door motor carrier service, that is, the shipment leaves the consignor in a motor carrier trailer and arrives at the door of the consignee in the same container, the motor carrier trailer. In TOFC service, the trailer is moved on railroad flat cars, and in sea-land service the trailer body or box is moved on a trailer-ship, during the course of the line-haul movement. Therefore, both TOFC and sea-land are similar in many respects to all-truck service.

Seatrain service is very similar to all-rail boxcar service in that the Seatrain service offers the shipper the transportation of his lading in a rail car from consignor to con-

signde. To the extent that all-rail service has certain service disadvantages, such as in the case of a shipper not located on a private siding, these disadvantages also generally beset the Seatrain service. Seatrain at present offers service between the ports of Edgewater, N. J., on the one hand, and, on the other, Texas City, Tex., and Belle Chasse, La., using freight cars as containers. Seatrain contemplates inauguration of a new service which it calls "seamobile", which will be similar to Pan-Atlantic's sea-land service. Seamobile would use new containers which could be transferred readily between Seatrain vessels, highway trailers, or railroad cars.

The rail carriers are of the view that Seatrain is a lower quality service than TOFC, and also that TOFC is generally of higher quality than all-rail box-car service. The rail carriers are also of the view that the record does not show that Seatrain is of lower quality than all-rail box-car service.

Generally, all of the parties herein agree that TOFC is a higher quality service than all-rail box-car service. A number of shipper witnesses presented by Pan-Atlantic stated that they would not use sea-land service at rates equal to or higher than rail rates. Pan-Atlantic reasons that, although this testimony dealt primarily with a comparison of sea-land versus rail box-car services, necessarily the testimony would apply in a comparison of sea-land versus TOFC, inasmuch as TOFC is the higher quality service as between itself and all-rail box-car service.

On the other hand, a number of shipper witnesses presented by the rail carriers made statements to the effect that they would not use TOFC service unless the railroads offered piggy-back rates equal to sea-land rates. Some of these shippers would not use carload box-car service because their customers are not located on rail sidings, whereas sea-land service provided store-door delivery, and these shippers consider that the railroads must provide TOFC service to compete with the sea-land service. One

of these shipper witnesses presented by the rail carriers stated that transit time has never been an important factor to it. Other shippers are concerned with transit times and state that between certain points not in issue herein sea-land service has been faster than all-rail box-car service.

A slower transit time is listed by Pan-Atlantic as one of its service disadvantages in relation to the proposed TOFC service. On four voyages during November and December, 1957, the average transit by sea-land was 13.98 days from eastern origins to Dallas and Ft. Worth. A study made by the rail carriers for all-rail box-car service showed average transit times of 10 days from New England to the southwest and 9 days from Trunk Line Territory to the southwest. Witnesses for the rail carriers testified as to various transit times for rail box-car service depending on routes used. Generally, so far as this record shows, TOFC service has about the same or one day faster transit time than all-rail box-car service. For cost purposes, the rail carriers and Pan-Atlantic used TOFC costs for trailer rental based on average round-trip times, respectively, of 13.4 days and 14 days. It is concluded that the average TOFC transit time one-way from origin to destination is about 7 days, and that sea-land is generally a slower service than TOFC.

A second disadvantage of sea-land is the infrequency of its sailings. If a shipper should miss a sea-land sailing his cargo would be held up by as much as six days awaiting the next weekly sailing. A third disadvantage of sea-land is the relative uncertainty and undependability of the sea-land ocean-going service. This uncertainty stems from storms at sea, fog, marine accidents, mechanical breakdowns, strikes, and threats of strikes. A fourth disadvantage of sea-land is the unavailability of in-transit privileges, such as those on rice, cotton, and flour. A shipper of canned baby food does not use Pan-Atlantic or Seatrains from Rochester, N. Y., to the southwest because it uses storage in transit via railroad at St. Joseph, Mo., and for this

reason irrespective of the rate level this shipper could not use water service.

Seatrain lists the same general disadvantages of its service in relation to the proposed TOFC service, as were listed by Pan-Atlantic. Seatrain has two weekly sailings from Edgewater, N. J., to Texas City, Tex., and two weekly sailings in the reverse direction. Seatrain time in transit via water between these ports is 6 days one way, and to this time there must be added from 3 to 5 days for the movement from New England or Trunk Line Territory to Edgewater, and 2 days for the movement from Texas City to Dallas or Ft. Worth. It is concluded that Seatrain transit time is slower than the proposed TOFC. Seatrain also lists restrictions on the size of cars which its vessels are designed to handle, and the bunching of cars at destination when shipped via Seatrain to a multiple-car consignee as further disadvantages of its service. As seen, it has been conceded by the parties that Seatrain is a lower quality service than TOFC.

There is relatively little evidence of record concerning the value of the sea-land service compared with the Seatrains service. Generally, the rail carriers consider sea-land service to be superior to the Seatrains service. Pan-Atlantic contends that the railroad position is influenced by the fact that some of the railroads participate in the joint rail-water-rail operations of Seatrains, that the railroads hope to make sea-land rates noncompetitive with Seatrains thus forcing Pan-Atlantic out of the Atlantic-Gulf picture, that the railroads realize that many of the Seatrains rates are maximum rates prescribed for application by Seatrains in Docket No. 28300, and that such rates cannot be condemned for application by Seatrains in the same manner that the railroads are seeking to have them condemned for application via Pan-Atlantic. Pan-Atlantic in summary contends that to all important intents and purposes the sea-land and Seatrains services are the same, both entailing ocean transportation, uncertainty of service, infrequency of sailings, and longer transit times than by TOFC.

Seatrains take the position that there is nothing of record to justify sea-land rates lower than Seatrain rail-water-rail rates, and that sea-land truck-water-truck rates which are lower than Seatrain rates, either in the measure of the rate, or by virtue of lower minimum weights, or both, are unjust, unreasonable, and lower than competitively necessary, and therefore injurious to the rate structure and contrary to the national transportation policy. Seatrain asks that Pan-Atlantic be ordered to publish and maintain rates and minimum weights no lower than those maintained by and for the account of Seatrain in its rail-water-rail service.

Since sea-land provides door-to-door service it would appear to have some service advantage over Seatrain as in those cases where a shipper is not located on a rail siding. Nevertheless, many shippers would not use sea-land service unless the sea-land rates were no higher than the Seatrain rates. In fact one shipper at Syracuse, N. Y., whose plant was constructed for rail shipments, would prefer to ship via all-rail or via Seatrain, rather than via sea-land. At least one shipper would discontinue using Pan-Atlantic's service if the sea-land rates were caused to be increased to a level higher than the Seatrain rates. This shipper and the others supporting Pan-Atlantic make no mention of the minimum weights attached to their sea-land and Seatrain rates, and it is concluded that as between sea-land and Seatrain the record does not justify the prescription of equal minimum weights. Seemingly, the same minima would not be practicable since sea-land shipments use trailer bodies as containers whereas Seatrain shipments use railroad cars as containers.

GENERAL DISCUSSION AND CONCLUSIONS. Whereas in the related proceedings entitled, I. & S. Docket No. M-10415, et al., *Commodities—Pan-Atlantic Steamship Corporation*, only the sea-land rates were in issue, in the present proceedings TOFC, sea-land, and Seatrain rates are in issue.

Therefore it is now necessary to consider the necessity for differentials between these rates, and whether minimum rates should be prescribed.

Both Pan-Atlantic and Seatrain ask that the proposed TOFC rates be found unlawful, and that the Commission exercise its power to prescribe minimum rates. Pan-Atlantic asks that the present TOFC rates, as distinguished from the proposed TOFC rates, be found minimum reasonable rates. Seatrain urges that if any readjustment of the relationship between sea-land and TOFC rates be required, that there be prescribed such relationship through the medium of a minimum rate order that will preserve the existing revenues of Seatrain, protect its rate levels, and perpetuate the differentials that it considers necessary for its continued operation. The rail carriers oppose the prescription of any rate differentials between their rates and water carrier rates herein. The rail carriers state that the Commission's power to prescribe or approve differentials in favor of water carriers exists only where such carriers in competing with overland services are operating under service disabilities and are possessed of the inherent ability to transport freight at lower cost than their overland competitors.

It is the position of the water carriers herein that the proposed TOFC rates will precipitate a cycle of destructive competition contrary to the national transportation policy. Seatrain states that if the proposed TOFC rates are permitted to become effective that Seatrain will publish immediately rail-water-rail rates reflecting proper and reasonable differentials under the TOFC rates; that Pan-Atlantic then will publish and maintain rates that are both no higher than Seatrain's rates and that are made differentially under the TOFC rates; and that the net result will be a rate relationship comparable to that now existing but on a substantially depressed basis. Seatrain says that there is little likelihood that the rate cutting activity would stop even at that destructive level, and that if the rail carriers

then seek to meet the reduced Pan-Atlantic rates, a further vicious cycle of rate cutting will ensue.

Among the witnesses for the rail carriers there were differences of opinion. One rail witness stated that as to TOFC service he did not know whether equality of rates with sea-land would be necessary or whether a lesser differential would be the answer. It is clear that if sea-land rates were higher than TOFC rates, there would be no sea-land shipments. Even at equal rates many shippers would have no incentive to ship via sea-land in preference to TOFC. It has not been shown that any traffic has moved via Pan-Atlantic at rates as high as the competing rail box-car or TOFC rates.

While no rule can be stated which applies to all shippers because of their varied needs, diverse commodities shipped, locations, and plant facilities, it has been shown generally that servicewise sea-land is not the equal of TOFC because of the slower transit time, less frequent service, and relative uncertainty of the deep-water service of Pan-Atlantic. The latter service has been improved substantially in relation to its prior break-bulk service, but not enough apparently to offset the traditional reluctance of the public to ship via water at rates equal to those of the overland carriers. On this record, there appears amply justified a differential of the sea-land rates under the proposed TOFC rates.

Section 15(a)(3) of the act provides that in a proceeding involving competition between carriers of different modes of transportation, in determining whether a rate is lower than a reasonable minimum rate, the Commission shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. The section provides further that rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy.

It is the declared national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each, to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers, all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of the Interstate Commerce Act shall be administered and enforced with a view to carrying out the declared national transportation policy.

The specific reference in section 15(a)(3) to the national transportation policy clearly qualifies the preceding clause in that section. The national transportation policy is meant to develop, coordinate, and preserve an adequate national transportation system by water, highway, and rail, as well as by other means. The use of the word, "and", means that the system must be adequate by each of the several modes.

In the present proceedings, among other things, we are concerned with the rates of the two water carriers operating in the Atlantic-Gulf coastwise trade. Before World War II, there were a considerable number of such carriers. The continued development and preservation of the remaining two now are threatened. It appears necessary that a rate differential or relationship be prescribed in order to foster the development and preservation of these coastwise water carriers. At the same time it is our duty to foster the development of rail transportation, including one of its newer forms, TOFC. It should not be fettered with onerous rate restrictions so rigid as to prevent its proper development. A flexible rate differential which is operative only under a limited range of circumstances or

conditions appears to be a possible answer to the admonition in section 15(a)(3) that the rates of one mode of carriage be not held up to a particular level to protect the traffic of another mode of carriage, giving due consideration to the national transportation policy.

In the public interest, and particularly in the interests of carriers of the different modes of transportation, it is well established that it is unjust and unreasonable for a carrier to establish rates which fail to yield out-of-pocket costs, especially when such rates lead to destructive competition. Another recognized principle is that a carrier may, in the exercise of its own good judgment, go below its so-called fully distributed costs in establishing rates. Low rates not only benefit the shippers, but also can benefit the carriers, in that a relatively small excess of revenue over out-of-pocket costs on each of relatively many units of traffic may well result in more total revenue above out-of-pocket costs than will a relatively large excess of revenue over out-of-pocket costs on each of relatively few units of traffic.

It is proposed now for the proceedings herein that there is justified a further modification of the principles stated in the preceding paragraph. This proposal relates to sea-land and TOFC only, inasmuch as costs for specific movements of Seatrain traffic are not of record. Herein there are two competing modes of transportation, sea-land and TOFC, there is a serious threat against the continued development and preservation of one of these modes (sea-land), one mode (sea-land), has recognized service disadvantages in the eyes of the shipping public other than the measure of the rates, and the other mode of transportation (TOFC), which has service advantages also has higher out-of-pocket and fully-distributed costs in connection with many shipments. Under these circumstances, it is proposed that there should be a relative limit of freedom of action for the higher cost mode of transportation. The higher cost mode in any event should be allowed to reduce its

rates down to its fully-distributed cost level, but in going below that level it should not go so low as to be competitively destructive.

It is proposed herein specifically, that where the proposed TOFC rates are below their fully-distributed cost level, that they should be at least 3 percent and at least 5 cents per 100 pounds higher than the corresponding sea-land level of rates, provided that on the individual movement, or in connection with specific rates, sea-land is the low-cost carrier on both the out-of-pocket and fully-distributed costs levels. This proposal is made in view of the recognized service disadvantages of sea-land herein and in view of the national transportation policy.

The above proposal should not prevent sea-land and TOFC from making reasonable reductions in their rates to the benefit of the shipping public, but when such reductions go beyond the stage of reasonableness and enter the state of unfair and destructive competition, the reductions should be checked. Admittedly, determinations of costs, particularly fully-distributed costs more so than out-of-pocket costs, are difficult, since these costs rest upon factors of judgment and theory as well as upon other factors which may be determined more precisely. However, no more feasible method of resolving the contentions of the parties in the light of section 15(a)(3) of the act has been presented in the opinion of the examiner. It is not believed that a minimum rate order without qualification related only to the present rates of the water carriers herein would be practicable, in view of the territorial extent of these proceedings, and the fact that the competing all-truck rates are not here in issue, among other factors. Among other reasons it seems clear that not all of the present rates herein are at or near a minimum reasonable level.

The Commission should find that the proposed reduced TOFC rate of 195 cents, minimum 24,000 pounds, on laundry sour from Baltimore, Md., to Dallas and Ft. Worth, Tex.,

is not shown to be compensatory and not shown to be just and reasonable. It should further find that the proposed reduced TOFC rates are unjust and unreasonable, and will result in unfair and destructive competition contrary to the national transportation policy in certain instances, wherein the following conditions all prevail: (1) on a given shipment or rate the TOFC costs are higher than sea-land costs on both out-of-pocket and fully-distributed levels, (2) the proposed TOFC rate is below the fully-distributed cost level, and (3) the proposed TOFC rate is less than 3 percent greater or less than 5 cents per 100 pounds higher than the corresponding sea-land rate. The Commission should further find that the proposed TOFC rates in instances other than those specified above in this paragraph are just and reasonable and otherwise lawful. Fourth-section relief should be denied and granted, respectively, in connection with the proposed TOFC rates found unlawful and lawful.

The Commission should further find that the sea-land rate of 216 cents, minimum 20,000 pounds, on paint, etc., from Baltimore, Md., to Dallas and Ft. Worth, Tex., is not compensatory and is unjust and unreasonable. And the Commission should further find that the other sea-land rates and the Seatrain rates under investigation are not shown to be unjust and unreasonable.

Appropriate orders should be entered and the proceedings discontinued.

APPENDIX B

RATIONALE OF COST FINDING SECTION

Cost Evidence:

Cost evidence relating to the trailer-on-flat-car service was introduced by the Southwestern rail carriers, Eastern rail carriers, and by the protestant, Pan-Atlantic Steamship Company. The Eastern rail carriers introduced a cost study for TOFC service based almost wholly on cost factors introduced by the Southwestern rail carriers. Since the cost evidence of the Southwestern rail carriers will be discussed in detail below, further comments on the Eastern rail carriers' cost evidence is considered unnecessary.

The Missouri Pacific Railroad Company introduced revenue and expense data intended to show that the proposed TOFC rates would produce compensative revenue when compared with the average revenue and operating expenses of carriers in the Central Western and Southwestern regions. The revenues and expenses were shown on a per-ton-mile and a per-car-mile basis for all traffic combined. In addition to not providing a separation of the expenses between terminal and line-haul and between out-of-pocket and fully distributed, these figures do not reflect the special characteristics of TOFC traffic, and therefore, are without probative value in measuring the compensatory nature of the proposed rates.

The Southwestern rail carriers originally presented cost data for the TOFC service with costs based on handling one trailer per flat car, two trailers per flat car, and with percentages of empty return of zero, 50 and 100 percent. Subsequently additional evidence was introduced which superseded the original presentation. This latter evidence was based on costs for the year 1956 from Statement No. 2-58 of the Bureau of Accounts, Cost Finding and Valuation, and adjusted by respondent to a level of May 1, 1958.

It compares out-of-pocket costs with the proposed rates for one trailer per car, for two trailers per car, and on a combined basis reflecting 75 percent two trailers per car and 25 percent one trailer per car. The empty return ratio used for the line-haul expense was 25 percent. The respondent considered the combined showing to be the most appropriate, although it conceded that such a performance was not presently attained. Based on respondent's cost presentation the proposed rates exceed out-of-pocket costs for all movements.

The protestant water carrier took many exceptions to respondent's cost presentation and restated the costs. A comparison of the proposed rates with the protestant's restated out-of-pocket costs showed most of the rates to be below out-of-pocket cost.

In order to more fully understand the cost elements involved herein a short description of the services rendered the TOFC traffic may be helpful. At point of origin the trailer is loaded at the shipper's dock and then moved to the ramp area of the originating railroad. The trailer is subsequently loaded onto the flat car and is tied down or made secure to the car. Upon completion of the loading the cars are switched from the ramp to the outbound train along with other types of cars. The train is then given a line-haul movement to the Western gateway where the TOFC cars are switched to the delivering railroad's ramp and the trailers are untied and removed therefrom. At the present time the TOFC cars are not interchanged between the railroads so that direct movement of the trailers is required for delivery to the connecting line. After delivery to the connecting carrier's ramp the trailers are again placed on flat cars and tied down and subsequently moved to final destinations, where the cars are again switched to a ramp, the trailers untied and removed, delivered to the consignee and unloaded, and returned to the railroad terminal. So far as these proceedings are concerned two types of cars are

involved: one is a flat car of single trailer capacity which is equipped with tie-down devices; and the other is a car especially designed to hold two trailers with special hold-down devices. The latter type of car is at present not owned by the railroads but is leased from a car company under mileage agreement and is referred to as a trailer-train car. The abbreviation of TTX will be used herein in referring to the two-trailer cars while the single-trailer cars will be referred to as R. R.-owned cars.

In view of the many points of controversy over the cost evidence in these proceedings each element of cost will be discussed individually below with the comments and evaluation by the Cost Finding Section immediately following each item.

(1) *Source and level of expense data:*

Respondent:

In its final cost presentation respondent based its rail costs on unit expenses shown in Statement No. 2-58 of the Bureau of Accounts, Cost Finding and Valuation, which showed costs for the year 1956 and also costs adjusted to a level of January 1, 1958. Respondent considered the costs as of January 1, 1958 to be overstated, and therefore used the 1956 costs adjusted to what it purported to be a May 1, 1958 level. This was accomplished as follows: The total operating expenses for the year 1957 were related to the total operating expenses for the year 1956 for the Eastern district and Western district separately. The percent of increase was found to be 1.57 percent for the Eastern district and .83 percent for the Western district. A cost-of-living adjustment of 4 cents per hour as of May 1, 1958 was applied to the total service hours for the year 1957, United States as a whole, and the resulting amount of increase was related to the total operating expenses for the year 1956 for the United States as a whole to produce an additional

adjustment of 1.14 percent. The latter amount was added to the previous percentage increases for the Eastern and Western districts to produce total adjusting percentages of 2.71 percent for the Eastern district and 1.97 percent for the Western district. These percentage adjustments were applied to the expenses for 1956 by respondent to produce costs as of May 1, 1958.

Respondent showed costs on an out-of-pocket level only. It contends that the amount of additional revenue which a commodity should produce above out-of-pocket cost should be contingent upon what the traffic can bear rather than on an arbitrary prorate based on averages of all traffic. Therefore, it did not show fully distributed expense.

Protestant:

In its restatement of the rail costs in respondent's Exhibit No. 3 protestant used the costs for the year 1955 shown in Statement No. 1-57, issued by the Bureau of Accounts, Cost Finding and Valuation, and underlying working papers thereto. These costs were adjusted for wage and price levels to January 1, 1958, based on data shown by rail carriers in Ex Parte No. 212.

Protestant showed its costs both on an out-of-pocket and fully distributed basis. The out-of-pocket costs include 80 percent of the operating expenses, rents and taxes, excluding Federal income taxes, plus a return of 4 percent after Federal income taxes, and 50 percent of the road property and 100 percent of the equipment. The fully distributed costs include, in addition to the out-of-pocket costs, the remaining 20 percent of the operating expenses, rents and taxes, the passenger train and less-carload operating deficits and return of 4 percent after Federal income taxes on the property as a whole. The revenue needs over and above the out-of-pocket costs are given a prorate ton and ton-mile distribution over all revenue traffic without distinction as to kind or class.

Cost Finding Section's comments:

The method used by respondent to adjust the 1956 expenses to a May 1, 1958 level completely ignores the amount of traffic moving in the respective years because only the total operating expenses and a cost-of-living adjustment are used to obtain the final adjusting factors. Respondent's method of adjustment is unacceptable.

The method of adjustment to a level of January 1, 1958 used by protestant assumes the same level of traffic for both periods but adjusts for the level of wages and prices. When the adjustment is made in this manner for only a one-year period there is small likelihood of error. However, when such adjustment is made for two years or more there is a possibility of overstatement since any increase in efficiency of operations is ignored.

In view of the fact that the sea-land costs reflect 1957 expenses and the TOFC pickup and delivery, tie-down cost and trailer rental expenses are based generally on the year 1957, the remaining TOFC expenses should also reflect a level for the year 1957. Accordingly the Cost Finding Section believes that the costs shown in its Statement No. 2-58, which are based on the year 1956 operations with adjustment to reflect wage and price levels as of January 1, 1958, are appropriate for use herein and these costs have been used in the restatement of respondent's and protestant's cost evidence. (A check of the costs shown in Cost Finding Section's Statement No. 5-58, which shows costs based on expenses for the year 1957, indicates very close agreement between those costs and the costs as of January 1, 1958 shown in Statement No. 2-58. The costs in Statement No. 5-58 would have been used in the Cost Finding Section's restatement except for the fact that this statement is not of record.) The out-of-pocket cost is the significant measure as to whether or not a rate is compensatory, but for comparative purposes we have also supplied the fully distributed costs in our restatement.

(2) *Switching at origin and destination:*

Respondent:

For the cost of switching at the TOFC ramps respondent used one-third of the territorial average switching time. The factor of one-third was based on data furnished by the Pennsylvania and the Baltimore and Ohio Railroads in the East, and the Texas and New Orleans, Texas and Pacific, St. Louis-Southwestern and Missouri Pacific Railroads in the Southwest. In computing the switching expense per car respondent included an allowance of 25 percent for switching empty cars.

Protestant:

Protestant contended that the data supplied to respondent by the various railroads were deficient in that they did not make allowance for switching of the empty car or for non-productive time of the yard locomotives. Protestant stated that the switching data used by respondent was, in some instances, based on estimates and it contends that a detailed study should have been made to determine the switching time of the TOFC traffic. The protestant restated the switching minutes to include an allowance for switching of empty cars equal to the number of loaded cars and for non-productive time. In the Eastern district protestant's restated figure amounted to 12.9 minutes per car which, when related to the territorial average of 30 minutes per car, produced a ratio of 43 percent. Protestant used 45 percent of the territorial average in its restatement. In the Western district protestant used a restated figure of 16.4 minutes per car which, when compared with the total average of 26 minutes per car, produced a ratio of 63 percent. Protestant used a ratio of 65 percent in its restatement.

Cost Finding Section's comments:

We believe that respondent should have made detailed switching studies to determine the switching minutes per

car for the TOFC traffic. In its restatement of respondent's switching minutes for the Eastern district, the protestant used only the minutes for the Pennsylvania Railroad at Kearny, New Jersey, Pittsburgh, and Philadelphia, and for the Baltimore and Ohio at Philadelphia. It ignored the time at St. Louis of 2.1 minutes per car submitted by the Pennsylvania Railroad in a letter to protestant under date of March 25, 1958, which is part of the working papers that parties agreed could be used. When this time is taken into account and adjusted for empty and non-productive time, the average switching minutes in the Eastern district is reduced from 12.9 minutes to 11.4 minutes. The Cost Finding Section does not agree with protestant's use of 100 percent allowance for empty switch which is normal for other than boxcar traffic. Once the loaded TOFC cars have been placed in the ramp there is no need to switch them away from the ramp until they are to be made up into a returning train except in those instances where the capacity of the ramp is limited to less than the total number of cars received. Except for reference to the four-car capacity of the Baltimore and Ohio TOFC ramp at Philadelphia, the record does not provide evidence as to this necessity and, in the absence thereof, the Cost Finding Section believes that an allowance for switching empty cars equal to the amount of empty movement that is present in the line-haul operation is appropriate. Therefore, we have adjusted protestant's switching minutes to reflect 25 percent empty switching in the Eastern district and 50 percent empty switching in the Western district. The use of these empty return ratios is discussed in a subsequent item. The adjusted switching minutes per car compute to 7.13 minutes in the East and 12.30 minutes in the West. When related to the territorial average minutes per car of 30.6 in the East and 26.7 in the West shown in Statement No. 2-58, the ratio of TOFC switching minutes to the territorial average becomes 23 percent for the East and 46 percent for the West.

(3) *Freight-train car costs:*

Respondent:

Respondent used a ratio of 45 percent of the territorial average for the freight-train car costs of railroad-owned cars. This was based on an average detention at origin and destination combined of 1.7 days as compared to the territorial average of 3.75 days. Respondent made no distinction between railroad-owned cars and privately owned cars.

Protestant:

Protestant also used a ratio of 45 percent of the territorial average for railroad-owned cars. The protestant developed the rental expense per car-mile for the TTX cars separately and the freight-train car costs for these cars is reflected in the line-haul expense.

Cost Finding Section's comments:

In its restatement of the costs the Cost Finding Section has used 45 percent of the territorial average for the TOFC freight-train costs for railroad-owned cars and has used protestant's treatment for the TTX cars.

(4) *Carload station clerical expense:*

Respondent:

Respondent included carload station clerical expense based on 50 percent of the territorial average for the East and for the West.

Protestant:

Protestant included this expense in total for each territory.

Cost Finding Section's comments:

In view of the fact that the TOFC traffic is interchanged between the Eastern district and Western district and would

APPENDIX A

RATES, COSTS, AND COST RATIOS

	Sea-Land						Trailer-on-Flat-Car												Ratios			
					Ratio, Rate to Costs										Ratio, Rate to Costs		SL to TOFC Costs					
			Costs		OP	FD	Costs								OP	FD	OP		FD			
	Mn	Rt	OP	FD			RR	TTX	RR	TTX	RR	TTX	RR	TTX			RR	TTX	RR	TTX		
Ammunition, From New Haven, Conn.	30	299	138	175	217	171	30	299	214	186	259	231	140	161	115	129	64	74	68	76		
Candy, etc., From Boston, Mass.	36	214	139	179	154	120	36	214	190	172	236	218	113	124	91	98	73	81	76	82		
Paints, etc., From Jersey City, N. J.	36	190	111	137	171	139	36	190	182	166	225	209	104	114	84	91	61	67	61	66		
Printed matter From Phila., Pa.	23	273	172	212	159	129	23	273	250	204	292	246	109	134	93	111	69	84	73	86		
Wire goods, aluminum, From York, Pa.	14	438	281	334	156	131	30	438	345	246	386	287	127	178	113	153	81	114	87	116		

(Rates and costs in cents per 100 pounds; SL is Sea-Land; TOFC is trailer-on-flat-car; TOFC rates are proposed; Rt is rate; Mn is minimum weight in 1,000 pounds; Ratios are in percents; OP is out-of-pocket; FD is fully distributed; RR signifies railroad-owned flat cars with a capacity of one trailer; TTX signifies leased flat cars with a capacity of two trailers; destination of shipments is Dallas-Ft. Worth.)

move on through billing respondent's treatment is proper and has been followed in the Cost Finding Section's restatement.

(5) *Loss and damage expense:*

Respondent:

Respondent included the territorial loss and damage clerical expense and the loss and damage claim payments based on the United States average for all other manufacturers and miscellaneous articles and for alcoholic beverages or liquor separately.

Protestant:

Protestant also included loss and damage clerical expense and loss and damage claim payments except that protestant included the loss and damage claim payments for each territory rather than once for the entire movement.

Cost Finding Section's comments:

In obtaining the loss and damage clerical expense from the carload unit cost sheets protestant used the expense per ton shown therein for an expense per hundredweight. Protestant's expenses of .599 cent for the Eastern district and 1.472 cents for the Western district should have been .030 cent and .074 cent, respectively. The loss and damage claim payments should have been included only once for the entire movement since these figures are based on United States averages without regard to length of haul. The loss and damage clerical expense and the loss and damage claim payments have been included correctly in our restatement.

(6) *Interchange expense:*

Respondent:

The costs from Statement No. 2-58 include interchange expense in the line-haul expense based on a cost per car-

mile. The statement provides for eliminating the interchange expense per car-mile and stating it on a per-interchange basis where such treatment is desired. Respondent has availed itself of this option and has included interchange expense based on 1.5 interchanges per loaded move in the East and .5 interchange in the West, subsequently increased for the empty movement. Over-the-street trailer interchange cost at the gateway point between Eastern and Western territories is included separately. Respondent contends that interchanges between certain carriers do not entail the switching and cost normally associated with interchange service and that they are merely paper transactions for division of revenue purposes. This would be true for interchanges between the Missouri Pacific and Texas and Pacific, the Atchison, Topeka and Santa Fe and the Gulf, Colorado and Santa Fe and the Kansas City Southern and Louisiana and Arkansas Railroads, and would also be true of certain interchanges in the East. Respondent stated that in the Western district it could not foresee any interchanges other than the so-called paper interchanges of TOFC traffic destined to Dallas or Fort Worth as between the Western district carriers, since the carriers named above provide direct routes between the gateways and Dallas and Fort Worth.

Protestant:

Protestant takes exception to respondent's reduction of the number of interchanges. It contends that even though complete switching service may not be required for those points referred to as paper interchanges there is still some cost associated with such service which should be included. In developing the line-haul cost the protestant has used both a shortest route and a longest route over actual rail lines and has included the expense for the actual number of interchanges required over each, including so-called paper interchanges.

Cost Finding Section's comments:

Respondent is correct in its contention that the cost for a paper interchange is considerably less than the cost for an interchange where normal switching is involved. However, the elimination of the entire cost for the paper interchanges is not considered proper, considering the fact that the interchange costs in Statement No. 2-58 are based on all types of interchanges as reported by the carriers. Thus, if the cost for paper interchanges were to be excluded the remaining interchange cost would have to be based on the expense per actual interchange which would be somewhat higher than the cost shown in Statement No. 2-58.

Protestant is wrong in including an interchange expense for the transfer of cars between the A. T. & S. F. and the G. C. & S. F. railroads. Because these two roads operate and report as a system the transfer of cars between them is not reported as an interchange. The expense for the transfer is reflected as intertrain or intratrain switching which protestant has included fully on a car-mile basis.

In its restatement the Cost Finding Section has included the average interchange costs expressed on a car-mile basis with the line-haul expenses. Since the interchange at the gateways between the East and West is performed by interchange of the trailer only and not of the rail car, a reduction equivalent to one-half the cost of a full interchange has been applied to the terminal costs in each territory. The effect of this treatment is to include roughly 0.6 interchange for a 900-mile haul in the West and from 1.8 to 2.6 interchanges for hauls of 900 to 1,200 miles, respectively, in the East.

(7) Intertrain and intratrain switching:

Respondent:

Respondent included intertrain and intratrain switching on a per car-mile basis but included only 50 percent of the total shown in Statement No. 2-58. The use of 50 per-

cent of the territorial average was not based on any special studies made by respondent but was based on respondent's belief that the trains in which the TOFC traffic moves are subject to less than average switching en route.

Protestant:

Protestant included the intertrain and intratrain switching expense on the territorial average basis without reduction.

Cost Finding Section's comments:

In view of the fact that respondent failed to introduce evidence showing that the TOFC traffic actually receives less than the average intertrain and intratrain switching the use of the territorial average expense for this service is considered to be proper and has been included in the Cost Finding Section's restatement.

(8) *Trailer rental expense:*

Respondent:

Respondent based its costs for trailer rental on an average charge of \$4.00 per day for a one-day period of 6.7 days (round-trip 13.4 days) plus an allowance for 25 percent empty return. This amounted to a total cost of \$33.50 per loaded trailer.

Protestant:

The protestant stated that the elapsed time used by respondent did not take into consideration the fact that trailers may be idle over the week-end, and that there might not be 100 percent utilization of the trailers; therefore, it based its costs on a 14-day round-trip or seven days' one-way plus an allowance for empty return. Based on a rental cost of \$4.00 per day this produced a cost of \$44.80.

Cost Finding Section's comments:

Testimony of record indicates that the running time between origin and destination would average 5 days, or 10 days for the round trip. An allowance of two days' time at the origin and at destination would appear to be reasonable. Therefore, in its restatement the Cost Finding Section has used an allowance for trailer rental cost based on a 14-day round trip adjusted for empty return instead of a 13.4-day round trip by respondent. The trailer rental cost thus computed amounts to \$38.50 per loaded trailer. The allowance for empty return for trailer rental amounting to 37.5 percent is the average of 25 percent empty return in the East and 50 percent in the West. These percentages are discussed subsequently.

(9) *Trailer interchange expense:*

Respondent:

Respondent based its costs for the over-the-street interchange of the trailer at the gateway between East and West on figures furnished by the Baltimore and Ohio and Pennsylvania Railroads, the average of which computed to \$5.25 per hour. Allowing one hour for the interchange and adjusting for 25 percent empty return, respondent computed a total of \$6.56 per loaded trailer for the interchange.

Protestant:

Protestant based its expense on figures furnished by the Pennsylvania Railroad, Missouri Pacific and Baltimore and Ohio and included allowance for 100 percent empty movement. A figure of \$24.90 was included for the Baltimore and Ohio, which combined with the amount of \$11.28 for the Pennsylvania Railroad and \$15.76 for the Missouri Pacific Railroad, produced an average of \$17.31 per loaded trailer.

Cost Finding Section's comments:

The figure of \$12.45, excluding allowance for empty, as used by protestant for trailer interchange for the Baltimore and Ohio, appears to be excessive when compared with respondent's figure of \$4.85. The record does not provide information as to this discrepancy, therefore, the Cost Finding Section has used respondent's figure of \$4.85 in its restatement. Protestant showed a figure of \$7.88 for the Missouri Pacific Railroad based on 1.5 hours at a cost of \$5.25 per hour. This latter figure has been included with respondent's figure to produce an average of \$6.12. When the latter amount is adjusted for an empty return amounting to 50 percent, a total cost of \$9.18 per trailer interchange is obtained. The latter figure is used in the Cost Finding Section's restatement.

*(10) Trailer tie-down and untie cost:**Respondent:*

Respondent used a basic cost for placing the trailers on the car and securing them and for releasing them and removing them from the cars of \$9.00 per trailer in the East and \$8.00 per trailer in the West. These figures were subsequently adjusted for 25 percent empty return giving total costs of \$11.25 per trailer in the East and \$10.00 per trailer in the West.

Protestant:

After adjusting the figures furnished to respondent by the various railroads for a clerical cost item protestant used figures of \$9.60 per trailer in the East and \$8.50 in the West for the trailer train cars, and \$24.84 in the East and \$8.50 in the Western district for railroad-owned cars.

Cost Finding Section's comments:

It was brought out in the record that the figures used by the protestant for tie-down costs in the Eastern district were based on figures furnished by the Baltimore and Ohio

which included not only the service at the ramp but the movement of the trailers between the ramp and shipper or consignee. In order to correct for this overstatement by protestant the Cost Finding Section has substituted the cost of \$9.60 as used by protestant for trailer train cars for the \$24.84 it showed for railroad-owned cars in the Eastern district. In the Western district the Cost Finding Section has used protestant's figure of \$8.50 for both railroad-owned and TTX cars. After adjustment for the respective empty return allowances the total cost per trailer becomes \$12.00 in the East and \$12.75 in the West.

(11) *Pickup and delivery expenses:*

Respondent:

The pickup and delivery costs include the movement of the empty trailer from the carrier's motor terminal to the shipper's dock, the loading of the trailer and the return of the loaded trailer to the ramp at the origin point, and the movement of the loaded trailer from the ramp at destination to the consignee's dock, unloading, and the return of the empty trailer to the ramp or to the carrier's motor terminal. Based on data furnished by the participating railroads respondent developed costs of \$9.00 per load in the East and \$6.90 per load in the West for the movement of trailers between the ramps and shipper's and consignee's docks. The loading and unloading expense used by respondent was 12.8 cents per hundredweight in the East and 11.3 cents per hundredweight in the West.

Cost Finding Section's comments:

The protestant used the respondent's figures in its cost presentation and the Cost Finding Section has done likewise in its restatement.

(12) *Weight of train for TOFC traffic:*

Respondent:

Respondent based its line-haul costs on those for through trains without adjustment for any reduction in

the weight of the train for expedited service. Respondent contends that the TOFC traffic is generally handled in regularly scheduled through trains and thus should reflect the cost of through train operations.

Protestant:

Protestant computed its line-haul cost of the TOFC traffic based on through train costs but with the weight of the train reduced by 25 percent. Protestant contends that the TOFC traffic moves in manifest trains and receives expedited service, and that such manifest trains normally operate with tonnage ratings which are from one-third to one-fourth less than other through trains because of the speed at which these trains are operated. It also cited movement by the Pennsylvania Railroad of the TOFC traffic from New York to Philadelphia with only 10 or 12 cars in a train. It also stated that the Baltimore and Ohio trains in which the TOFC traffic is handled have tonnage ratings that have 25 percent to 30 percent less traffic than other through trains. The effect of protestant's treatment is to increase the gross-ton-mile portion of the line-haul expense by roughly five percent in the Eastern district and by three percent in the Western district.

Cost Finding Section's comments:

Although it may be true that the TOFC traffic may receive expedited service in less than average weight trains in some instances protestant has not shown this to be true generally. With regard to the movement by the Pennsylvania Railroad of the TOFC traffic between New York and Philadelphia in small trains this movement comprises only a small part of the total movement from Eastern points to the Southwest and it cannot be assumed that because such movement occurs over a short distance the same would be true for the remainder of the haul. In addition, the effect of protestant's adjustment of the total line-haul expense is negligible. In the absence of special studies which would show the actual average weights of trains in which the

TOFC traffic is handled, the Cost Finding Section believes that the use of the through train average cost is proper and this has been used in its restatement.

(13) *Tare Weight of cars and trailers:*

Respondent:

Respondent made no adjustment in its costs for the difference in tare weights of the cars used for TOFC service from the tare weight of ordinary flat cars. Also, it made no adjustment for the difference in weight for flat cars of two-trailer capacity from those of one-trailer capacity. In addition, it failed to include the tare weight of trailers in computing its expenses. It also failed to distinguish between railroad-owned cars and cars rented on a mileage basis.

Protestant:

Protestant developed its costs for railroad-owned cars and for those cars rented on a mileage basis (TTX cars) separately. Based on figures furnished by several railroads concerned with the TOFC traffic it determined that the tare weight for railroad-owned cars was 55,200 pounds before addition of the tare weight of the trailer. After addition of the 11,500 pounds average tare weight of a trailer the total tare weight of the railroad-owned car becomes 66,700 pounds. For the TTX cars it determined the average weight to be approximately 78,000 pounds before addition of the trailer tare weight. Based on information furnished by the railroads protestant determined that in the Eastern district the TTX cars were loaded with an average of 1.7 trailers per car and in the Western district the TTX cars are operated with an average of 1.45 trailers per car. The total tare weight of the TTX cars and trailers computes to 97,550 pounds in the Eastern district and 94,675 pounds in the Western district.

Cost Finding Section's comments:

The respondent is in error in not recognizing the difference in tare weights between the type of cars and in not making allowance for the additional tare weight of the trailers. The use by protestant of the average number of trailers per car for the TTX cars is also considered to be proper because this reflects the average utilization of the cars. The Cost Finding Section has used protestant's tare weights in its restatement except for a reduction of 800 pounds in the tare weight of TTX cars based on information in the working papers. It has used average number of trailers in the East of 1.7 trailers per TTX car and 1.5 trailers per TTX car in the Western district in its restatement.

*(14) Net load per TTX car:**Respondent:*

Respondent assumed a net load for cars carrying two trailers of twice the minimum weight per shipment.

Protestant:

The protestant developed the net load for TTX cars by adding to the minimum weight per shipment an amount equal to .7 of an average weight per shipment taken as 30,000 pounds in the East and .45 of 30,000 pounds in the Western district. The figures of .7 and .45 are derived from the average number of loaded trailers handled on TTX cars as described in item 13 above.

Cost Finding Section's comments:

The use of twice the minimum weight by respondent is incorrect since it overlooks the fact that a trailer of one minimum weight may be handled with a trailer carrying an entirely different load on the same flat car and also ignores the fact that the average utilization of the TTX cars appears to be less than the maximum possible of two trailers per car. The Cost Finding Section has used protest-

ant's procedure except that it has rounded off the figure of .45 to .50.

(15) *Empty return ratio:*

Respondent:

Respondent developed its line-haul expenses using an allowance for empty return of 25 percent for the ratio of empty car-miles to loaded car-miles. This figure was based on judgment and reflects a long range viewpoint. It does not actually represent the empty return ratio experienced at the time the evidence was placed on record. Respondent feels that the figure of 25 percent is a reasonable figure to expect considering the increasing use of TOFC service.

Protestant:

Based on information furnished by the participating railroads protestant used ratios of empty to loaded TOFC car-miles of 60 percent for railroad-owned cars in both the East and West, and 23 percent in the East and 100 percent in the West for TTX cars.

Cost Finding Section's comments:

An examination of the working papers shows that in the Eastern district the Baltimore and Ohio showed no empty trailer movement on its own cars in either direction during the month of January 1958. During the same month the Pennsylvania Railroad showed an empty return of 23 percent for its TTX cars. Based on these showings the Cost Finding Section feels that use of a ratio of empty to loaded car-miles of 25 percent in the Eastern district for both railroad-owned and for TTX cars is not unreasonable, and it has used this ratio in its restatement. The working papers also show that in the Western district the Texas and New Orleans Railroad showed a ratio of empty to loaded car-miles of 49 percent for the months of October, November, and December of 1957, and January 1958 for

railroad-owned cars. Other carriers in the Western district showed a ratio of 100 percent empty return for both railroad-owned cars and TTX cars. The Cost Finding Section believes that the high empty return ratios experienced in the Western district will not remain static but will be reduced as the TOFC traffic develops. The TOFC service concerned herein is in reality a substitute for boxcar service. It is reasonable to assume, therefore, that the empty return ratio would approach that of boxcars. Statement No. 2-58 shows the ratio of empty to loaded car-miles for carload boxcar traffic to be 36 percent. The use of an empty return ratio of 50 percent for the Western district is, therefore, considered to be reasonable and this has been used in our restatement.

(16) *Line-haul miles:*

Respondent:

Respondent based its line-haul miles on the average short-line distance between the origin and the Chicago and E. St. Louis gateways, and between the gateways and destination increased by 13 percent to allow for circuitry.

Protestant:

Protestant computed costs for so-called shortest practicable routes and longest practicable routes.

Cost Finding Section's comments:

If these proceedings did not involve Fourth Section considerations, costs computed for respondent's mileages would suffice. Because Fourth Section considerations are involved, the costs based on routes longer than the average are important to measure the compensativeness of the proposed rates over the more circuitous routes. Therefore, the Cost Finding Section has used both respondent's average mileages and protestant's longest mileages in its restatement of the costs.

Conclusion:

Based on the relationship of present sea-land rates to the sea-land costs as restated for the commodities concerned herein, the present sea-land rates equal or exceed the restated out-of-pocket costs for all movements and exceed the fully distributed expense except for eight movements.

The proposed TOFC rates equal or exceed the restated out-of-pocket TOFC costs computed for hauls with average circuitry for all movements by TTX car and for all but six movements by railroad-owned cars. The proposed rates equal or exceed the fully distributed costs for 14 movements by railroad-owned cars and for 43 movements by TTX cars, out of the 66 rail movements. The restated sea-land costs, both out-of-pocket and fully distributed, is below the restated TOFC cost for all movements of comparable weight.

For hauls with the greatest amount of circuitry the proposed TOFC rates equal or exceed the out-of-pocket costs for 33 of the movements on railroad-owned cars and for 62 of the movements on TTX cars. Based on information in the working papers for these proceedings it appears that a greater number of trailers is carried on TTX cars than on railroad-owned cars.

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. M-10415¹

COMMODITIES—PAN-ATLANTIC STEAMSHIP CORPORATION

Decided

“Sea-land” local and joint, single-factor through rates on numerous commodities, in trailerload, multiple trailerload and volume quantities, over single-line routes of Pan-Atlantic Steamship Corporation and over joint-line routes of motor common carriers and Pan-Atlan-

1. This report also embraces 23 other proceedings. Twenty-two of these were orally heard, namely, I. & S. No. M-10430, Adipic Acid—Boutte & Luling, La., to East, I. & S. No. M-10431, Commodities, Sea-land—Louisiana to East, Pan-Atlantic Steamship Corporation, I. & S. No. M-10434, Various Commodities—New Jersey, New York, and Pennsylvania to Florida and Texas, I. & S. No. M-10437, Pulpboard-Fibreboard—Evadale, Texas to New York, N. Y., I. & S. No. M-10469, Aluminum Articles—Massena, N. Y., to Texas, I. & S. No. M-10582, Various Commodities, Sea-land, East to Florida, Louisiana, and Texas, I. & S. No. M-10599, Paper—South to New York and New Jersey, I. & S. No. M-10602, Commodities—East to Alabama, Florida and Texas, I. & S. No. M-10624, Foodstuffs—Louisiana and Mississippi to Connecticut, Maryland, Massachusetts, New York, Pennsylvania and Rhode Island, I. & S. No. M-10679, Feed—Florida to New England and Trunk Line Territory, I. & S. No. 6847, Fresh or Frozen Foods—Sea-land-Pan-Atlantic Steamship Corporation, I. & S. No. 6848, Paper—Alabama to Florida and Florida to Texas, I. & S. No. M-10698, Sea-land-Pan-Atlantic Steamship Corporation, Plastics and Wire Cloth, I. & S. No. M-10716, Brushes, Connecticut, Massachusetts, and New York to Texas, I. & S. No. M-10721, Various Commodities—Pan-Atlantic Steamship Corporation, I. & S. No. M-10722, Sea-land Various Commodities, Pan-Atlantic Steamship Corporation, I. & S. No. M-10825, Commodities, Pan-Atlantic Sea-land Service, I. & S. No. M-10945, Commodities, Pan-Atlantic Steamship Corporation, I. & S. No. M-10946, Commodities, East, South, and Southwest, I. & S. No. M-10963, Various Commodities, Pan-Atlantic Sea-land Service, I. & S. No. 6870, Aluminum and Petroleum, Texas and Louisiana to Florida, and I. & S. No. 6894, Commodities, Pan-Atlantic, Florida, Louisiana, and Texas. The last 10 listed proceedings originally were part of a separate record entitled I. & S. No. M-10698 et al., but later by agreement these 10 proceedings were merged for handling in the same report with those entitled I. & S. No. M-10415 et al. The twenty-fourth proceeding herein is I. & S. Docket No. 6985, Frozen Citrus Products—Florida To Official & New England Points, which has not been heard. By order dated February 17, 1959, Division 2, acting as an appellate division, ordered that this proceeding be consolidated for disposition in a report with I. & S. No. 6847.

tic, from, to, and between numerous points in the east, on the one hand, and, on the other, points in the south and southwest, also, from, to, and between points in the south, on the one hand, and, on the other, points in the southwest, also from and to points in the south, found just and reasonable, and not to constitute an unfair or destructive competitive practice in contravention of the national transportation policy in at least approximately 458 instances; other such sea-land rates in 11 instances found not shown to be just and reasonable. Those rates found unlawful ordered canceled, and proceedings discontinued.

William H. Ambrecht, L. A. Parish, and Warren Price, Jr., for respondents, Pan-Atlantic Steamship Corporation and motor-carrier participants in Pan-Atlantic tariffs.

Charles W. Bucy and Leonard M. Shinn for the Secretary of Agriculture of the United States, intervener in support of respondent, Pan-Atlantic.

Edwin J. Miller and J. J. A. Winzenried for other interveners in support of respondent, Pan-Atlantic.

Joseph Hodgson, Jr., and S. S. Eisen for Seatrain Lines, Inc., intervener as its interests may appear.

Edwin N. Bell, James A. Bistline, J. P. Canny, Arthur J. Dixon, Earl E. Eisenhart, Jr., Robert T. Falet, Russel L. Frink, R. C. Gill, Ernest D. Grinnell, Jr., Carl Helmetag, Jr., Bernard Hulkower, Eugene E. Hunt, William Q. Keenen, Howard D. Koontz, V. H. Livingston, Donald McDevitt, J. Edgar McDonald, Prime F. Osborn, Leo H. Pou, Clarence Raymond, B. V. Reynolds, Charles P. Reynolds, Albert B. Russ, Jr., Walter G. Treanor, Donal L. Turkal, R. S. Trigg, and Harold B. Wahl for protestant railroads.

Guy H. Postell, Reuben G. Crimm, James E. Haydon, and J. G. Quisenberry for protestant motor carriers.

Report Proposed by Charles E. Morgan, Hearing Examiner.

By schedules filed to become effective on October 28, 1957, in I. & S. No. M-10415, and later in the other proceedings, the Pan-Atlantic Steamship Corporation (called Pan-Atlantic), and the motor common carrier participants in Pan-Atlantic tariffs proposed to establish at least approximately 469 new reduced commodity rates² for the transportation in "sea-land" service of numerous commodities,³ in trailerload, multiple trailerload, and volume quantities, from, to, and between numerous points, in the east, south, and southwest. Upon protests of rail carriers in these areas, The Eastern Central Motor Carriers Association, Inc., and the Southern Motor Carriers Rate Conference, Inc., the operation of the schedules was suspended to and including May 28, 1958, in I. & S. No. M-10415, and later in the other proceedings, after which dates the schedules became effective.⁴

The Secretary of Agriculture of the United States, the Keystone Macaroni Manufacturing Co., Inc., and the Devoe & Reynolds Co., Inc., intervened in support of Pan-Atlantic.

2. Rates are stated in cents per 100 pounds.

3. Including brass, bronze or copper rods, candy and confectionery, silica gel, radio and television sets, lead, adipic acid, alcoholic liquors, synthetic plastics, rubber, building and paving materials, ammoniacal liquors, sodium acetate, ammonium chloride, potassium caustic, lard, mud treating compounds, petroleum, plastic materials, springs, clay tile, welding compound, pulpboard, fibreboard, aluminum articles, bags or bagging, calcium chloride, shortening acids, soda, sodium nitrate, paper, paper articles, electrical appliances, air-conditioners, glass bottles, paint, printing paper, wall paper, lube oil, canned or preserved food-stuffs, animal or poultry feed (citrus pomace), frozen foods, frozen fruit products (concentrates), fresh citrus fruit, frozen vegetables, frozen seafoods, paper bags, wrapping paper, paper boxes, aluminum wire cloth, bronze wire cloth, brushes, brush factory products, coal tar dyes, chemicals, christmas tree holders, cement paste, machinery, spices, spring assemblies, tile, iron or steel wire cloth, woodpulp, aluminum oxide catalyst, transformers, frit, pumps, paint pigments, wallboard, metallic sodium, coffee, iron and steel articles, braided paper, soap, shipping carriers, molasses, chocolate syrup, phosphorus pentasulfide, flour bleaching compound, graphite, softener, ammunition, building metal work, chewing gum, coppers, cordage, toilet preparations and drugs, floor covering, lamps, automobile tires, aluminum billets, and window glass.

4. In I. & S. No. 6985, originally by order of August 5, 1958, the schedules were suspended to and including March 8, 1959. By order of August 7, 1958, this proceeding was discontinued, but by order of November 11, 1958, it was reopened. By order of February 17, 1959, the order of August 5, 1958, was vacated insofar as it suspended the operation of the schedules in I. & S. No. 6985, but the investigation therein remains in force and effect.

The Secretary of Agriculture is particularly concerned, on behalf of the agricultural community, but believes that revenues from agricultural commodities alone would not sustain the maintenance of the new and desirable sea-land service, and therefore considers as a practical matter that the interest of the agricultural community extends to the establishment of rate levels which will be attractive to a wide range of nonagricultural traffic. The Seatrain Lines, Inc. (called Seatrain), intervened as its interests may appear. Seatrain at present operates in a rail-water service using freight cars as containers. It contemplates inauguration of a new service which it calls "seamobile", which will be similar to Pan-Atlantic's sea-land service. Seamobile would use new containers which could be transferred readily between Seatrain vessels, highway trailers, or railroad cars.

As a common carrier of general commodities and passengers, Pan-Atlantic is authorized to operate generally between the ports of Boston, Mass., New York, N. Y., Philadelphia, Pa., Baltimore, Md., Georgetown and Charleston, S. C., Jacksonville, Miami, Tampa, Port St. Joe, Panama City, and Pensacola, Fla., Mobile, Ala., New Orleans, La., and Galveston and Houston, Tex. The operating rights of Pan-Atlantic include the transportation of property loaded in motor-vehicle trucks or trailers on trailerships, *Pan-Atlantic S. S. Corp. Operating Rights*, 297 I. C. C. 773.

THE SEA-LAND SERVICE. Sea-land service sometimes also is called trailership (trailer-on-ship) or fishyback. In this service the lading is transported over both highway and water in the same containers. These are 35-foot boxes, or trailer bodies, of special design, which are detachable from the trailer chassis and wheels. These boxes are lifted on and off the Pan-Atlantic trailerships, and on and off the trailer chassis, without handling the lading inside the boxes. The trailerships are so constructed that each trailer box fits into a slot to prevent shifting at sea. From the

standpoint of the shipper, the sea-land service is essentially a motor-carrier operation since a highway trailer is loaded at the door of the consignor and the same trailer is unloaded at the door of the consignee, with the principal difference being that the container (trailer box) is moved a considerable distance on an ocean-going ship. In many respects sea-land is similar to trailer-on-flat-car (piggy-back) service. As seen, in sea-land service only the trailer body and not the trailer chassis and wheels are transported over the water.

In sea-land service, when the consignor wants the container (trailer box) sealed, it is sealed. Generally, this assures that lading will not again be handled until it finally arrives at the consignee's place of business and is unloaded under his supervision. Trailers are not sealed when it is intended to put in additional lading at some other point. Less-than-truckload freight ordinarily would not be sealed.

Sea-land is a new service compared with Pan-Atlantic's prior break-bulk water service, in that in sea-land there is no interchange of the lading. Sea-land is not new compared with the prior break-bulk service, in that both provide or provided joint routes with motor common carriers and door-to-door service from consignor to consignee. In the prior break-bulk service longshoremen handled the lading into and out of the ships, whereas in sea-land the boxes containing the lading are lifted on and off of the ships by the use of two gantry type cranes on the vessels. Each crane is capable of unloading one trailer and placing another on board ship in about five minutes. These patented cranes are parts of the ships, and eliminate the need for costly shore installations. The cranes make it possible to serve any port having adequate water and dock-side aprons large enough to permit bringing truck chassis alongside the ship.

The stevedoring expense of the old break-bulk service of Pan-Atlantic was about three to four times greater than the vessel operating costs, whereas in sea-land service ste-

vedoring expense is very small compared with the vessel cost. Compared with the slower and more expensive break-bulk service, sea-land has reduced considerably Pan-Atlantic's cargo handling time, its in-port vessel time, and its loss, damage and pilferage expenses.

A trailership generally can be loaded in about one day and unloaded in about one day. Basic loading procedures call for the placing of an outbound box on the ship, and replacing an inbound box on the same trailer chassis which was used to bring the outbound box on to the pier. Thus, the rate of loading equals the rate of unloading.

The trailer boxes used by Pan-Atlantic in sea-land service have a capacity of about 2,088 cubic feet for dry-cargo and open-top equipment, and of about 1,520 cubic feet for refrigerated equipment. Whether the boxes are loaded or empty, a full complement of 226 boxes is carried always on each voyage, because it is necessary to keep a balance of boxes at the several ports, and because of the necessity of maintaining the stability of the trailerships.

To achieve the proper balance of the cargo, fore and aft, port and starboard, and top and bottom, it is necessary that there be a systematized sequence of loading of the trailer boxes. For this purpose, many of the boxes to be loaded are assembled at a parking lot near the port at least 60 hours in advance of arrival of the ship, and the bulk of the cargo must be delivered to shipside parking lots prior to 12 hours before the arrival of the ship. The proper sequence affects the trim of the vessel, the list of the vessel during and upon completion of loading, and the degree of roll and stability. In addition, certain types of containers must be stowed in a limited number of positions only, dependent upon weight, container construction, cargo carried, and destination. No container destined for the next immediate port should be stowed underneath containers destined for later ports in a sailing schedule. One truck breakdown en route to the parking lot from a pickup point could destroy the entire planned loading sequence for any

one hatch. Generally, for various reasons, Pan-Atlantic cannot accept sea-land freight and load it on a ship on the same day.

Both single-line and joint-line sea-land services are provided by Pan-Atlantic. It operates single-line between ports and port terminal areas which it is authorized to serve, by use of its trailerships on the water and leased tractors and trailers on the land. For example, frozen foods may move single-line via water from the port of New York to the port of New Orleans. (Both pickup and delivery would be in Pan-Atlantic motor equipment.) This motor equipment is operated under the Pan-Atlantic name and operating rights. The automotive equipment is leased from an affiliated corporation, not owned but under common control. In some instances Pan-Atlantic has operated single-line 60 miles beyond a port. The extent of its single-line operations are the subject of complaints in dockets Nos. MC-C-2163 and 2167.

The joint-line sea-land service of Pan-Atlantic covers the ports and port terminal areas and extends well beyond. For example, electrical appliances may move joint-line, motor-water-motor, from Somersworth, N. H., via ports of New York, N. Y. (Port Newark, N. J.), and Houston, Tex., to Dallas, Tex. Where the route is listed in part as "motor", this means line-haul service under the operating rights of motor common-carriers, and not line-haul service under the operating rights of Pan-Atlantic. Pan-Atlantic tractors are used in moving the trailers between parking lots adjacent to the dock and the docks. Phosphorous pentasulfide may move, motor-water, from Buffalo, N. Y., via the ports of Port Newark and New Orleans, La., to Oak Point, La. (Delivery would be in Pan-Atlantic motor equipment.) Coffee may move, water-motor, from New York City via the ports of Port Newark and Houston, to Tulsa, Okla. (Pickup would be in Pan-Atlantic motor equipment.)

Presently, Pan-Atlantic is a wholly-owned subsidiary of McLean Industries, Inc., called McLean. The total invest-

ment in the new type sea-land operations made by McLean or its subsidiaries or affiliates has been about 40 to 45 million dollars, including about 50 percent for conversion of break-bulk type vessels to sea-land vessels, over 20 million dollars for automotive equipment, and about 0.5 million dollars for procurement of terminal facilities, including docks, piers, staging areas, and warehouses.

The pool of highway equipment which is or will be available to Pan-Atlantic consists of about 3,000 dry-cargo (closed-van) trailer boxes, about 500 mechanically-refrigerated boxes, about 300 open-top boxes, about 1,700 trailer chassis, and about 300 tractors, pickup and delivery, and miscellaneous vehicles. While there will be a total of 3,000 dry-cargo boxes, about one-third of these will be used in a trailer-on-ship service to Puerto Rico. The dry-cargo box, used by Pan-Atlantic in sea-land service plus trailer, chassis, weighs about 10,000 to 10,200 pounds, and has a capacity of payload freight of about 40,000 pounds.

The sea-land tariffs do not provide extra charges for the use of refrigerated equipment, and the rates on commodities requiring such equipment are intended to have been adjusted for this expense. The mechanically-refrigerated boxes have dual type motors. An electrical motor is used for the refrigerating machinery while a box is aboard ship, and a motor using butane or other fuel when the box is on land. A refrigerated box plus trailer chassis weighs a total of about 13,000 to 14,000 pounds, and has six inches of insulation. The greater weight of the refrigerated equipment, together with State maximum weight laws, result in lesser maximum permissible loads of payload freight in the refrigerated equipment than in dry-cargo boxes. For this reason, in computing adjusted costs, hereinafter, 35,000 pounds has been used on frozen and fresh commodities moving in refrigerated equipment in sea-land service via Port Newark over New Jersey highways, as the maximum load per trailer, in lieu of the tariff minima of 36,000 pounds, 40,000 pounds, and 80,000 pounds (2 trailers).

The New Jersey highway weight limitation is 60,000 pounds, and the maximum weight of payload freight depends upon the equipment utilized. In I. & S. No. 6985, Pan-Atlantic published rates with minima of 35,000 and 70,000 pounds on frozen or chilled fruit products from Florida origins moving via Port Newark over New Jersey highways to eastern destinations. The minimum weights in I. & S. No. 6985 were coupled with the same rates as already were under investigation in I. & S. No. 6847, wherein the former minima were 36,000 and 80,000 pounds. The suspension of the rates in I. & S. No. 6985 was vacated in consideration in part of the agreement of Pan-Atlantic to abide by the order resulting from the investigation in I. & S. No. 6847 with respect to the rates in I. & S. No. 6985. Any further discussion, conclusions, or findings herein, which relate to the same rates from and to the same points on the same commodities in both dockets Nos. I. & S. 6847 and 6985, but which relate to the different minima in those dockets, will be considered as relating to the lower minima of 35,000 pounds and 70,000 pounds (2 trailers). These lower minima by reason of the State weight laws will result in more economic operations by Pan-Atlantic in the utilization of refrigerated trailers.

HISTORY OF PAN-ATLANTIC OPERATIONS. Since 1933, Pan-Atlantic has operated as a conventional break-bulk carrier, except that during World War II years, its vessels, along with those of other domestic water carriers, were taken over by the United States Government for war purposes. In April 1956, Pan-Atlantic started using two tanker-trailerships, which had been converted from T-2 tankers, in its Atlantic-Gulf-coastwise service. Four tanker-trailerships ultimately were placed in this service, but have been removed. These tanker-trailerships transported 60 containers on deck, besides bulk oil in the tanks. In its prior break-bulk service, Pan-Atlantic utilized C-2 freighters, each with a gross capacity for lading of 10,500 tons.

In May, 1957, Pan-Atlantic suspended its Atlantic-Gulf coastwise break-bulk service to provide ships for conversion into trailerships. For its sea-land service in the Atlantic-Gulf coastwise trade, Pan-Atlantic converted four ships into lift-on-lift-off type trailerships, each with a capacity of 4,000 tons of payload freight, and each holding 226 boxes or containers, of which 166 are stowed below deck and 60 on deck. The ships are 468 feet long, and are capable of a speed of about 15.5 knots, substantially the same as when the ships were used in the prior break-bulk service.

In October, 1957, Pan-Atlantic began trailership service which included the ports of New York, Miami, Houston, and Tampa. Later, the port of New Orleans was added, and for a time the port of Philadelphia (Wilmington, Del.) was served. In April and May, 1958, the Pan-Atlantic trailership scheduled service included a round trip between the ports of New York and Houston direct, and a round trip between the ports of New York and New Orleans, serving the port of Miami on the southbound journey, and the port of Tampa on the northbound journey. Ultimately, when more ships are available, the port of Mobile may be added.

Besides its sea-land service as described above, presently Pan-Atlantic provides a break-bulk service in the Intercoastal trade between ports on the Pacific and Atlantic. Pan-Atlantic or an affiliate has provided or will provide another trailership service between North Atlantic ports and Puerto Rico. In this service a shipment might move via motor carrier from Chicago, Ill., to Port Newark, thence via trailership to Puerto Rico. In this service to Puerto Rico, two additional trailerships are or will be used. This makes a total of six trailerships under the control of McLean. In the event that the two additional trailerships are not used in service to Puerto Rico, they also would be suitable for use in the Atlantic-Gulf coastwise service.

WATER CARRIERS AND THE NATIONAL DEFENSE. Trailership service to and from ports on the Great Lakes via the

St. Lawrence Seaway is possible physically, and is under consideration by Pan-Atlantic. In the future there also is the possibility of sea-land service to and from Alaska and Hawaii, since trailerships can sail all the seas, oceans, and rivers where the water is deep enough. At one time, Pan-Atlantic advertised that it would place ten trailerships in operation, and should this be done, more tonnage could be handled and sailings could be more frequent. From the standpoint of competition between the several modes of transportation, the rate pattern which may result from these proceedings, also may have considerable bearing in connection with the possible-resumption of services by other coastwise water carriers which have not resumed operations since World War II.

Prior to World War II there were about 19 deep-water common carriers operating in the Atlantic-Gulf coastwise trades, employing about 139 vessels. In 1940, these water carriers transported over 8,500,000 tons of cargo. Today, there are only two of these carriers operating in this trade, namely Seatrain and Pan-Atlantic, which operate, respectively, six and four vessels. A comparison introduced by Pan-Atlantic shows that between 1939 and 1956, the tonnage handled by class I railroads in the United States increased 160.5 percent, and the tonnage handled by class I motor carriers increased by 545.6 percent, but excluding bulk oil carried by Seatrain and Pan-Atlantic, the tonnage handled by water carriers in the Atlantic-Gulf coastwise trade suffered a decrease of 79 percent.

During the post-World War II period, generally there has been a substantial expansion of commerce in the United States, particularly in the south and southwest, but an exception to the general growth of transportation has been the Atlantic-Gulf coastwise dry-cargo tonnage of the water service. Pan-Atlantic estimates that Seatrain operating as at present with full capacity would transport about 1,000,000 net tons per year, and that Pan-Atlantic would transport about 800,000 net tons per year (100 round-trip

voyages with full loads of 4,000 tons in each direction). The total for the two water carriers would be 1,800,000 net tons, compared with over 8,500,000 net tons transported by the water carriers in the same trade prewar.

Excluding bulk petroleum carried in tankers, as recently as 1950, Pan-Atlantic carried in excess of 1,000,000 tons in its coastwise break-bulk service. In 1956 and 1957, respectively, Pan-Atlantic carried in coastwise service only 433,915 tons, and 332,057 tons. Newtex Steamship Company (called Newtex), another line which resumed operations in the coastwise trade in the post-World War II period, ceased operating in 1956.

Upon the resumption of its prior break-bulk service following World War II, Pan-Atlantic and other domestic coastwise water carriers were handicapped seriously by substantial increases in operating costs, particularly costs in loading and unloading cargo from the ships.

The United States Maritime Administration stated in a 1955 review in part:

In short the crux of the coastwise-intercoastal shipping problem is in the break-bulk dry-cargo trade today as it was before the war. The re-establishment and preservation of this segment of the domestic fleet is of vital national defense importance if the immediate needs of a future grave national emergency are to be met. It is obvious that the ready availability of ships employed in domestic operations may well be a critical factor in any initial military or civil defense operation of the United States occasioned by a future atomic or thermo-nuclear war.

Further, an economically sound, low-cost domestic fleet will continue to make important contributions to the economic growth and development of the United States as a whole and a balanced national transportation system in particular.

Traffic figures indicate that the decline in dry-cargo tonnage has occurred primarily, if not wholly, in the

break-bulk dry-cargo trades where rising costs, particularly in loading and discharging the ship, have largely eliminated the so-called inherent economic advantages of ocean transport.

The basic, long range solution of the break-bulk dry-cargo problem appears to lie in the adoption of technological improvements which will reduce cargo handling and other related costs and result in less in-port time and better vessel utilization.

The above statements show the importance of American ships to the national defense, and the need for reducing rising costs. In Pan-Atlantic's opinion, these proceedings involve far more than the usual competitive struggle between carriers for traffic, and rather there is ultimately involved the survival of an important segment of our domestic Merchant Marine. Concerning the matter of reducing costs, it has been the experience of Pan-Atlantic that its expenses in the present sea-land trailership operation are from \$10 to \$12 per cargo ton less than those incurred in the previous break-bulk type operation. This reduction in expenses is mainly the result of reduction in cargo handling time and in-port vessel time.

THE SEA-LAND RATES. The sea-land rates under investigation herein are from, to, or between points in 15 States, namely, Massachusetts, New Hampshire, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, and Maryland in the east, Florida, Alabama, and Mississippi in the south, and Louisiana, Texas, and Oklahoma in the southwest. The respondent, Pan-Atlantic, listed approximately 489 rates as among those under investigation, of which some 20 rates have been canceled under special permission. Some of the rates listed are said by Pan-Atlantic to be representative of more rates where the rates shown were believed sufficient to show the principal of rate-making employed by Pan-Atlantic. No at-

tempt has been made herein to enumerate all of the rates under investigation.

In addition to the rates under investigation, sea-land rates also are published from, to, or between points in the States of Maine, Vermont, Virginia, West Virginia, Ohio, Tennessee, South Carolina, and Arkansas, also points in Canada, and the District of Columbia. About 250 motor carriers participate in Pan-Atlantic's tariffs. Since Pan-Atlantic has recourse to numerous connecting motor carriers whose operational spheres reach throughout the United States, the rail carrier protestants consider Pan-Atlantic's sea-land service to be an actual and potential threat to much of their long-haul and heavy-loading, high rated tonnage. There are other pending proceedings in which Pan-Atlantic rates are under investigation, and the parties therein have stipulated that the record herein be considered therein.

The avowed motivation of Pan-Atlantic in publishing these sea-land commodity rates is its necessity to secure traffic in competition with other carriers, whether rail, motor, or water, and particularly in competition with the overland carriers. Since the record does not show specifically that any traffic has moved via Pan-Atlantic at rates as high as the competing rail rates Pan-Atlantic insists that its rates must be differentially lower than rail rates. It also seeks differentials under motor carrier rates. The motor-carrier competition faced by Pan-Atlantic is from common and private carriers, and from motor carriers hauling so-called exempt commodities. Where the competition is considered by Pan-Atlantic to be the rates of Seatrain, Pan-Atlantic proposes equalization of the rates with those of Seatrain. In connection with a few of the proposed sea-land rates, those on toilet preparations and drugs in I. & S. No. M-10963, Pan-Atlantic rates were published for the avowed purpose of equalizing the barge rates published by C. G. Willis, Inc.

Pan-Atlantic sea-land rates include marine insurance of the lading without extra charge. To the extent that

Seatrain does not provide such free marine insurance, Pan-Atlantic's charges would be lower than Seatrain's charges at equal rates. When Pan-Atlantic operated its prior break-bulk service, it also provided marine insurance between many points, but generally not between points in official territory and the southwest. In sea-land service when the lading is on the highways, the motor carrier provides insurance.

Traditionally water rates, including water-rail and water-motor rates, have been maintained at levels differentially lower than all-rail rates, principally because of the inherent disadvantages in the water services of uncertainty (perils of the sea), slower transit time, and infrequency of sailings. The last major consideration of the rates of the Atlantic-Gulf coastwise water carriers was in the *Class Rate Investigation, 1939*, Docket No. 28300, 286 I. C. C. 5 (1952). Therein the Commission prescribed maximum reasonable first-class rates on ocean-rail traffic, also maximum reasonable percentage relations of the lower classes to first class, between North Atlantic ports and interior points in eastern seaboard territory, on the one hand, and, on the other, New Orleans and Baton Rouge, La., Texas Gulf port, and interior points in the southwest. These prescribed maximum class rates were designed to preserve the then existing differentials of the ocean-rail rates under the all-rail rates. The maximum water rates prescribed therein were applicable exclusively to the Seatrain nonbreak-bulk service, and to the ocean-rail break-bulk water services of Pan-Atlantic and Newtex, since these were the only Atlantic-Gulf coastwise water carriers then (1952) in operation.

Pan-Atlantic had in effect for a number of years arrangements for through and continuous carriage with the railroads, and joint rates with overland carriers, both rail and motor. Joint water-motor rates were published by Pan-Atlantic to become effective as early as 1936. Pan-Atlantic also has published so-called "through nonconcurring" rail-water class rates.

The prescribed rates in Docket No. 28300 were class rates only, whereas in the present proceedings only commodity rates are in issue. Prior to the inauguration of its sea-land service, Pan-Atlantic maintained between points in Eastern and Southwestern territories a substantial number of joint truck-water commodity rates generally on the same level as the ocean-rail class rates prescribed in the *Class Rate Investigation, supra*. Pan-Atlantic's class rate structure between Eastern and Southwestern territories also was on the same general level as prescribed for ocean-rail class rates.

Pan-Atlantic made a complete evaluation of the rate structures of the existing water carriers and of the overland carriers, and concluded that the existing water rate structures were inadequate. Pan-Atlantic concluded that its sea-land service needed rate differentials under all-rail rates, but that lesser differentials would suffice than those differentials that had been maintained under its previous break-bulk service.

For its trailership service, Pan-Atlantic first put into effect class rates, and later commodity rates. Generally, the class rates were protested, but were not suspended and went into effect. Many of the commodity rates were suspended and are under investigation in these and other proceedings. The class rate structure put in by Pan-Atlantic and considered by it to be fair and proper, varies depending upon origins and destinations, the direction of the competing rail rate-making routes, constructive water mileages, and maximum prescribed ocean-rail rates, among other factors.

Generally, exclusive of exceptions due to the above factors, Pan-Atlantic constructed its trailership class rates on the basis of 92.5 percent of the overland carrier rates on terminal (port) to terminal (port) traffic, and on the basis of 95 percent of the overland rates on traffic moving, from, to, or between interior points located beyond the terminals (ports).

The commodity rates for its trailership service were constructed by Pan-Atlantic generally, but with many exceptions, so that they are related percentagewise to the all-rail commodity rates in the same measure as the sea-land class rates are related to the all-rail class rates. For example, between New York, N. Y., and Miami, Fla., the sea-land class rate structure is based on 92.5 percent of the all-rail class rates, and if a commodity rate were established between these two points, the sea-land commodity rate would be 92.5 percent of the all-rail commodity rate. As there were exceptions to the 92.5-95 percent formula in the class rate structure, there are also numerous exceptions to the 92.5-95 percent formula for commodity rates. Additionally, there are many individual adjustments in the commodity rates to accommodate individual shippers. Also individual adjustments are made in the commodity rates because the competition varies between all-rail carriers, all-motor common carriers, Seatrain, a barge line, and exempt motor carriers. Also there are instances where the sea-land rates were designed to preserve competitive relationships between shippers located at different origins. The result is a wide fluctuation in the amounts of the differentials established by the sea-land rates in relation to the all-rail commodity rates.

For example, the sea-land rate on paper boxes, from Miami, Fla., to Houston, Tex., is 96 cents, minimum 36,000 pounds, compared with the all-rail rate of 143 cents, same minimum. In this case, the competition faced by Pan-Atlantic was the result of a leased truck arrangement costing 101 cents, minimum 32,000 pounds. The proposed sea-land rate is 5 cents or about 5 percent under the leased truck rate. It is Pan-Atlantic's view that the all-rail rates fail to bear a consistent relation to cost, and therefore that sea-land differentials under all-rail rates cannot follow a consistent pattern on the basis of costs. Rather, Pan-Atlantic contends that the value of service consideration must be of primary economic importance in fixing of intercarrier rate differentials.

The protestant rail carriers point out that Pan-Atlantic has not attempted to justify the differential between a particular sea-land commodity rate and the rate of any other common or contract carrier by relating it to the added costs of the shipper using the sea-land service, but that Pan-Atlantic has gone upon the assumption that a differential is required primarily because a part of the sea-land service is operated over the water. For example, the entire justification, exclusive of Pan-Atlantic cost and other general evidence relating to the sea-land service, of the sea-land rate⁵ of 140 cents, minimum 26,000 pounds, on petroleum from Bayway, Elizabeth, and Nutley, N. J., to Goodhope, La., is that, "All-rail service is the competition in every instance." "The rates proposed for sea-land service are, in every case, 7 cents per 100 pounds under the all-rail rates." "This figure represents a basis only 5 percent less than the all-rail rates."

Nothing is said of the petroleum shippers' relative advantages or disadvantages in using the two competitive forms of transportation. From this example, it appears that the principal basis of constructing the sea-land rates was to establish differentials under the overland competitive rates; and that this was done without regard to individual items of cost that might or might not be incurred by the shippers using either sea-land or competitive services. Of course, Pan-Atlantic considered its own costs, and generally did not establish, in its opinion, rates that would not be compensatory to it, that is, in most cases cover fully distributed costs, and in all cases, cover out-of-pocket costs. One rate, from New Orleans, La., to Rochester, N. Y., on foodstuffs (canned goods) of 106 cents, minimum 36,000 pounds, admittedly according to Pan-Atlantic, does not cover out-of-pocket costs, and Pan-Atlantic intends to cancel that particular rate.

There are so many rates in issue, that it is impossible to say that any one rate or any group of rates is representa-

5. Where comparisons are made with all-rail rates, the rates include Ex Parte No. 206-A general increases where applicable.

tive or typical of the other rates. Generally, the sea-land rates are lower than the all-rail rates. In a few instances, for example where there are more than one rate and more than one minimum on a commodity, the all-rail rates are lower than the proposed sea-land rates at the higher minima. Some of the sea-land rates are listed in Appendix "A" hereto. Also shown in this appendix are sea-land costs, and corresponding all-rail rates and costs. The sea-land costs are broken down between the Pan-Atlantic portion of the costs and the motor carrier portion of the costs. Also shown are the ratios of the sea-land rates to the sea-land costs, and the ratios of sea-land costs to all-rail costs. The costs shown in this appendix are those obtained from a restatement of the sea-land costs developed by our Cost Section.

Costs. The respondent, Pan-Atlantic, and the protestant rail carriers, submitted extensive cost evidence. Protestant southern motor carriers also submitted cost evidence concerning the transportation of frozen concentrates. These cost studies have been considered by our Cost Section as requested by the parties. The Cost Section has restated the sea-land costs. Necessarily the restatement is too voluminous to be reproduced in its entirety in this report, but it will be available for examination by the parties, and it is reproduced in part in Appendix "A" hereto. The detailed rationale of the restatement is contained in Appendix "B" hereto. Generally, the Cost Section has concluded that the proposed sea-land rates exceed the costs for most movements, also that a comparison of the sea-land costs with all-rail costs, shows that the sea-land costs exceed for most movements where rail costs are shown of record the all-rail costs, and that this latter relationship is more pronounced at high minimum weights.

From the examiner's analysis of the Cost Section's study, it is noted that of the 489 rates listed, including 20 rates canceled under special permission, 13 failed to yield out-of-pocket costs, and 145, or about 30 percent failed to

yield fully-distributed costs. For our approval it is not necessary that any one rate yield fully-distributed costs, but a carrier's rates as a whole should cover these costs. Some of the sea-land commodity rates more than double out-of-pocket costs and nearly double fully-distributed costs. Other sea-land rates exceed costs by narrower margins. The record does not show the volume of traffic which will move or is moving on the sea-land commodity rates herein. Also, Pan-Atlantic has other commodity rates and class-rates. Therefore only the future can tell whether these sea-land rates as a whole will be fully compensatory. Since the Pan-Atlantic sea-land trailership service is relatively new and somewhat, if not largely, still in its developmental stage, perhaps even a few rates which do not yield out-of-pocket costs should not be disapproved on that ground alone, considering that those low-yield rates may be considered developmental rates, or they may be in the nature of, or akin to, so-called back-haul rates. Under one theory of back-haul rates, any revenue is better than none if the container in question must be moved empty, whereas under the more prevalent theory each rate should stand on its own feet and at least cover out-of-pocket costs.

Pan-Atlantic is proposing a rate on shipping carriers, (empty barrels and bottles), from Daytona Beach, Fla., to Philadelphia, Pa., of 77 cents, minimum 16,000 pounds, on which the out-of-pocket cost as shown in the restatement is 147.8 cents, making a ratio of rate to cost of 52 percent. The out-of-pocket costs as shown by Pan-Atlantic is 72.3 cents with a ratio of rate to cost of 107 percent.

In the restatement of costs, there are 13 listed rates which yield less than out-of-pocket costs. Two of these were canceled under special permission. They are the rates from Houma, La., to Syracuse, N. Y., and from St. Martinsville, La., to Baltimore, Md. Of the remaining 11 rates listed in the restatement as not yielding out-of-pocket costs, besides the rate on empty barrels and bottles above, there are four rates on canned goods, four rates on pulpboard,

and two rates on synthetic plastics. The canned goods rates are from New Orleans, La., to Baltimore, Md., (rate—99 cents, out-of-pocket cost—102.6 cents, ratio—96), from New Orleans, La., to Rochester, N. Y., (rate—106 cents, out-of-pocket cost—115.3 cents, ratio—92), from Gulfport, Miss., to Philadelphia, Pa., (rate—101 cents, out-of-pocket cost—103.6 cents, ratio—97), and from St. Francisville, La., to Miami, Fla., (rate—92 cents, out-of-pocket cost—95.2 cents, ratio—97). The four rates on pulpboard are from Bogalusa, La., to New York, N. Y.,⁶ and from Kreole, Miss., to New Brunswick and Wharton, N. J., and to New York, N. Y.⁶ Respectively, these pulpboard rates are 92, 88, 90 and 88 cents, their restated out-of-pocket costs are 95.5, 91, 91, and 91 cents, and their ratios are 96, 97, 99 and 97. The two rates on synthetic plastics are from Baton Rouge, La., to Baltimore, Md., and Rome, N. Y. Respectively, these rates are 109 and 122 cents, their restated out-of-pocket costs are 113 and 123.8 cents, and their ratios are 96 and 99.

The minimum weights used in computing the restated costs in connection with these 11 rates are the tariff minima, and in instances where the tariff minima exceed 40,000 pounds and the shipments would necessitate using two trailers the minimum weights used are half of the tariff minima. As seen, the ratios of these 11 sea-land rates to their restated out-of-pocket costs range from 52 to 99 percent. Excluding the empty barrels and bottles rate, the ratios range from 92 to 99 percent. From the usual standards, since these 11 rates do not cover out-of-pocket costs, they should be considered as not shown to be compensatory, and a finding should be made that they are not shown to be just and reasonable.

One of the principal matters in dispute between the parties concerning the development of sea-land costs is the

6. The rates listed on pulpboard from Bogalusa and from Kreole to New York, N. Y., apply only to stations in New Jersey taking the New York, N. Y., rates, and a higher listed rate applies to New York, N. Y., from Kreole. The higher listed rate exceeds out-of-pocket cost in the restatement.

use by Pan-Atlantic of a factor of 75 percent in computing its vessels and port out-of-pocket expenses. Pan-Atlantic's computations of its costs are based on its experience on five voyages. Of the 226 trailer boxes carried per voyage the average was 75 percent loaded boxes and 25 percent empty boxes. Pan-Atlantic feels that in time its voyages will enjoy 100 percent loaded trailer boxes, and therefore that only 75 percent of the vessel costs were out-of-pocket expenses. To reach 100 percent of capacity on every voyage a perfect balance of traffic would have to exist between northbound and southbound traffic, and between all legs or ports on a voyage. If the traffic were to double additional vessels would be required. The Cost Section used 100 percent of direct expenses before the addition of overhead to determine the out-of-pocket water costs of Pan-Atlantic. The treatment of out-of-pocket costs by the Cost Section is amply justified by the facts of record, and by usual costing methods. Reference should be made to Appendix "B" on other matters of costing methods in issue herein.

THE COMPARATIVE VALUE OF THE SEA-LAND SERVICE. The primary accomplishment of its sea-land trailership service in the opinion of Pan-Atlantic lies in the reduction of the internal operating expenses of Pan-Atlantic, rather than in any substantial improvement in the value of its service to the public. On the other hand, the opposing carriers generally contend that there has been a substantial change in the character of Pan-Atlantic's service from the old break-bulk service to the new trailership service, and particularly in its value to the shipping public. Pan-Atlantic's own literature and public advertisements promise that the shipper using its trailership service will save transportation costs, avoid delays, prevent damage, and accomplish reduction in loss, damage and pilferage. To substantiate their contentions, Pan-Atlantic and the opposing carriers offered the testimony of numerous shippers. Generally, the direct evidence of these witnesses was in the form of

verified statements received as exhibits, and their cross-examination was oral.

The views of the shippers as a whole were many, varied and seemingly contradictory, according to their individual transportation problems. The most important factor to the shippers as a whole is the measure of the rates. The shippers want reasonably low rates to be available, and they want these rates available by as many different or competing modes of transportation as possible. One shipper of frozen orange juice and other products offered statements in behalf of both Pan-Atlantic and the railroads. With the exception of frozen concentrates, the commodities referred to by the shippers in behalf of the railroads are not commodities on which the rates herein are under investigation. The evidence offered by these shippers was admitted because of its relevancy to the facts and issues herein, particularly insofar as it pertains to the general nature and value of the sea-land and all-rail boxcar services.

Many shippers would not use sea-land service at rates equal to or higher than all-rail or all-motor carrier rates. A number of shippers also would not use sea-land service at rates higher than those of Seatrain. Some shippers, which would not use sea-land service if Pan-Atlantic rates were equal to rail rates, also would not give any of their traffic which is moving via sea-land service to the railroads if the present higher rail rates are maintained at the present differentials over sea-land rates. Some shippers would not use all-rail service even at differentials under all-motor carrier or under sea-land rates. At least one shipper would use sea-land at rates equal to rail rates because of the drayage expense when using rail service. Many shippers state that sea-land rates should be differentially under rail rates, and many shippers state that rail rates should be differentially under sea-land rates. In the past, one shipper used Newtex and Seatrain only where those carriers provided differentials under all-rail rates. Price competition in the sale of some commodities is so keen that the shippers of

these commodities cannot pay a transportation premium for one mode of service as against another mode of service:

TIME IN TRANSIT. Time in transit is a factor considered by many shippers along with rates and other factors in determining the value of a transportation service. Many shippers have found all-rail or all-motor carrier service to be faster than sea-land service. Other shippers have found sea-land service to be faster than all-rail service. Time in transit is important to some shippers during certain seasons only. For example, a shipper of air-conditioning equipment during the colder weather months is concerned principally with low rates and transportation charges, but during the warmer weather months he is willing to pay higher rates to get faster service. Most of his shipments move in the colder months. Time in transit is not important on consignment stocks to warehouses. Time in transit varies widely from commodity to commodity, and according to origins and destinations.

A study by the rail carriers using a random sampling technique showed average transit times by rail of 10 days from New England to the southwest, 9 days from New England to the south, 9 days from Trunk Line territory to the southwest, and 8 days from Trunk Line territory to the south. This study showed that the rail service was extremely inconsistent. Certain advertised rail schedules were introduced by Pan-Atlantic. Times shown are 5 days from New York, N. Y., to Jacksonville, Fla., 4 days from Philadelphia, Pa., to Tampa, Fla., 5 to 7 days from Baltimore, Md., to Miami, Fla., and 4 to 6 days from these origins to Dallas and Ft. Worth, Tex.

A study made by Pan-Atlantic showed average transit times by sea-land on four voyages during November and December, 1957, of 13.98 days from eastern origins to Dallas and Ft. Worth, Tex. Rail carriers point out that the latest sea-land schedules show that the vessels move between Newark and Houston in 6 days, between Newark and

Miami in 3 days, and from Tampa to Newark in 4 days. Allowing 2 days at both origin and destinations for the "land" portion of the trip, and adding the "sea" schedule, the rail carriers obtain total transit times somewhat faster than those obtained by Pan-Atlantic in its study. The rail carriers contend that the Pan-Atlantic study covers movements when the sea-land service was new and subject to operational difficulties which plague every new venture.

The rail carriers contend that where there were no holidays or other exceptional circumstances, and where the motor carrier operations of the sea-land service were conducted with reasonable dispatch, that the sea-land transit times were as fast or faster than all-rail. Generally, Pan-Atlantic has been able to adhere very closely, if not almost exactly, to the "sea" portion of its scheduled sea-land service. Of course, collisions, accidents, and severe storms at sea are always a possibility, and these factors no doubt will at some time in the future disrupt sailing schedules. In the past in its prior services, Pan-Atlantic has suffered from fog, storms at sea, collisions and a sinking, as well as from numerous labor disturbances, strikes or tie-ups. In fact, one witness considered it about normal to have some sort of tie-up on the docks in the New York port area. The railroads and motor carriers also are subject to the possibility of labor tie-ups and weather conditions such as snow or sleet which may slow their services. Sea-land is faced also with the possibility of a break-down of a vessel while in service and other vessels are not available as spare equipment, which is a more serious matter with Pan-Atlantic than with the motor carriers and railroads, which have substitute equipment more readily available.

Turning from the sea portion of its service to the land portion, the time cannot be accurately estimated. As seen, the proper sequence of loading a ship requires many of the trailers to be delivered to the parking lot adjacent to a port at least 60 hours in advance of sailing time. Of course, an individual shipment might be delivered with

much less time to spare and yet be in time to be loaded on board the trailership. That individual shipment may show a very fast total time in transit compared to other shipments moving on the same trailership. Once a sea-land shipment is in the hands of a connecting motor carrier, it may be delivered promptly or held up at the convenience of the motor carrier. In other instances delivery may be delayed for the convenience of a consignee. One thing is clear and that is that the time consumed in loading and discharging a trailership in sea-land service is less than the time of loading and discharging a break-bulk ship in the prior break-bulk service. Where it took two days for loading in the break-bulk service, it appears that one day would suffice in the sea-land trailership service. This saving in time no doubt varies from port to port depending upon the amount of cargo or trailers to be loaded or discharged at a particular port. To the extent that comparable transit times justified differentials in the Pan-Atlantic rates for its break-bulk service under the all-rail rates, it would appear that there is somewhat lesser justification for such differentials in connection with the sea-land trailership service. Where there are several ports or legs of a sea-land journey, the saving in the time factor for loading and discharging cargo might be considerable in connection with a shipment which remained on board the trailership for several legs of a voyage.

FREQUENCY OF SERVICE. Frequency of service or sailings is another factor cited by many shippers. In many instances the railroads and the motor carriers provide daily service or more frequent service than the once or twice-a-week service of sea-land. By rail a shipper may ship every day, but using sea-land he may have to bunch his shipments. A shipper may suffer disadvantage by missing a Pan-Atlantic sailing when he is seeking to replenish a low inventory at a destination point. On the other hand, some shippers may have difficulty in securing rail equipment on short notice for dispatching the same day to meet emer-

gency stock requirements. In some instances rail switching service is only semi-weekly, so that some shippers must order cars in when the switching service is provided, and a shipper may make arrangements to have a car placed a day before it is needed.

Sea-land service once or twice a week from the ports has not proved to be materially disadvantageous to some shippers because many consignees can anticipate their needs and have sufficient storage space to keep goods on hand between ship arrivals. Some shippers consider that specific sea-land sailing dates and delivery dates are consistent, and that there are inconsistencies in rail departures and uncertainties in rail arrivals and delivery dates. The importance of frequency of service varies from commodity to commodity, and according to the individual needs of the various shippers.

COSTS OF LOADING OR OF UNLOADING. Another factor considered by shippers in determining the value of a transportation service is the cost of loading or of unloading a trailer versus a box car. Pan-Atlantic's tariffs provide that in the sea-land service, subject to certain restrictions and limitations, the truck driver will load and unload the trailers from and to points near the tailgate. In actual practice the driver is given considerable latitude. Generally, the Pan-Atlantic sea-land service driver will provide the same service in loading and unloading as is provided by motor common carriers in all-motor carrier service. By contrast, the shippers and consignees are required by the rail tariff provisions to load and unload rail carloads without any assistance from rail employees.

One shipper found it necessary to have an additional man compared with the man-power needed for rail shipments to load sea-land trailers because its plant was constructed for rail shipments. Many shippers found that additional men or man-hours were required to load rail cars compared with sea-land trailers. Loading and unloading or assistance in these operations by the truck driver

is not desired by some shippers and consignees, and such services although provided by the tariffs often are not used. Beer and ale are loaded and unloaded by a shipper and his distributor-consignees with their own labor, whether the beer and ale is shipped in trailers or in rail cars, but in this instance the Pan-Atlantic tariff requires by appropriate restrictions or limitations that the loading and unloading be by the shipper because of the weights of the pallets. Lift trucks are used by the shipper in this loading operation.

Some shippers feel that the assistance of the truck driver in loading or unloading is offset in the use of rail cars by the provisions of 48 hours free time for loading or unloading. Generally, in sea-land service as in all-motor-carrier service the trailers must be unloaded promptly upon arrival, but there are exceptions to suit the carriers' and shippers' conveniences. Some shippers are able to order trailer equipment and have it spotted within two hours. In some instances, Pan-Atlantic will place its trailers for loading two or three days prior to actual sailing dates, thereby enabling a shipper to load equipment at times when the shipper's warehouse labor otherwise would be idle. Many shippers have found the substantial differences in the cost of loading trailers and rail cars, and this factor to these shippers has not been a determining element in their selection of the mode of transportation.

The warehouse labor of some shippers was equally available whether called upon to load and unload sea-land trailers or rail box cars, and therefore the costs of loading and unloading were the same for each mode of transportation. Some shippers found it less expensive to unload sea-land shipments than rail shipments, for one reason because of the convenient placement of trailers, and for another reason because on a rail shipment a shipper may have to wait for switching crews. Loading and unloading costs vary widely from commodity to commodity, and from shipper to shipper.

BLOCKING, DUNNAGE, AND BRACING. Another factor considered by some shippers is the cost of blocking, dunnage, and bracing of shipments. Costs for strapping and flooring paper for rail box cars including labor was greater for one shipper than its costs for these items when it used sea-land trailers because sea-land provided some of the labor for stacking the lading in the trailers. Some shippers have found it more economical to load a trailer than a rail car because the former needs less dunnage, blocking, and bracing than the latter. Cleaning rail cars has been added expense for some shippers. Other shippers have experienced no differences in these costs whether using trailers or rail cars. Generally less dunnage or no dunnage is required when damage free or compartmentizer cars are used. Many shippers found that dunnage, blocking, and bracing costs were not a factor in determining the mode of transportation utilized. The requirement of dunnage varies widely from commodity to commodity.

DOOR-TO-DOOR SERVICE. Door-to-door service is an important consideration to many shippers. In sea-land-service since the lading often moves in a sealed trailer from the door of the consignor to the door of the consignee without being handled enroute, the result is practically no damage. Also, there may be considerable convenience to the consignee in that various grades and sizes of articles will arrive already stacked and sorted in a manner that will save time and labor at the destination.

Where a shipper or consignee does not have a private or assigned rail siding, the sea-land service has a distinct advantage over rail service, the same as does all-motor-carrier service. One shipper does not have private sidings at its Miami and New Orleans warehouses and would not use all-rail service even at differentials under all-motor-carrier or under sea-land rates. Some New York City consignees do not have private or assigned sidings, making drayage necessary when using all-rail service, whereas no drayage expense is incurred in using sea-land service.

Where drayage is necessary there is also the likelihood of damage due to the extra handling of the lading. At least one shipper would use sea-land service at rates equal to all-rail rates because of the store-door delivery feature which is not available via all-rail. Another shipper believes that all-rail rates should be differentially lower than sea-land rates for numerous reasons including the cost of installation and maintenance of rail private siding facilities, and the cost of drayage. A survey made by Pan-Atlantic showed that out of 2,350 of its potential shippers and consignees, 1,805, or about 77 percent, had private rail sidings, while 545 were either off track or were served by team tracks.

DAMAGES OR LACK OF DAMAGES TO THE LADING. Another factor in the value of service is the matter of damages or lack of damages to the lading, and the related matters of inconvenience to customers and goodwill. Generally, the experience of shippers using sea-land service has been that it entails either negligible or no loss, damage, pilferage, or breakage. A distributor of liquors shipped about 3,500,000 pounds in a year from an origin in Pennsylvania to its Texas warehouses entirely damage free using sea-land service. Also, some shippers have found that the present sea-land service is not as subject to weather conditions as were the vessels in the old break-bulk service with cargo in open holds.

Many shippers have found that rail shipments are damaged frequently. Some shippers suggest that rail box car rates should be differentially lower than sea-land rates to offset the expense and inconvenience resulting from loss and damages on rail shipments. Many other shippers do not consider loss and damages as a factor determining the mode of transportation.

So-called damage free and compartmentizer cars are available to shippers in railroad service to a limited extent. The percentage of such cars compared with the total number of box cars is very small. When damage free cars or com-

partmentizer cars are used, damages generally are negligible. Some shippers have found in using such special cars that their expenses of loading are increased. The higher purchase costs of damage free and compartmentizer cars has deterred the railroads from investing their capital on a large scale in these types of equipment. Although most shippers desire to use such special cars when available, generally these cars have not been readily available.

Oddly, one shipper of bottle caps from Brooklyn, N. Y., which caps are not subject to damage, nevertheless used damage free cars entirely, apparently because such cars were available when the bottle caps were to be shipped.

STOP-OFF PRIVILEGES. Some shippers use railroad stop-off privileges frequently. A number of shippers use all-motor or all-rail service because of the availability of stop-off arrangements, such as storage in transit, diversion in transit, and milling in transit. The sea-land service provides stop-off privileges in connection with the land portions of the service. Some shippers consider the sea-land service to be more flexible than all-rail service, in that three sea-land deliveries are permitted in a given city with no penalty other than the stop-off charges. The stop-off charges via railroads are \$18.09 in Official territory, and \$16.20 in the Southwest, compared with the sea-land stop-off charge of \$13.00, and the lower sea-land charges are advantageous to some shippers.

One shipper found that the rail stop-off charge at Dallas, Tex., on a shipment from an eastern origin to Houston, Tex., was too expensive because he had to pay the rail freight rate to Houston, but using sea-land service through the port of Houston, this shipper was not subjected to the same disadvantage. A traffic study by the rail carriers for the period of December 2 to 6, 1957, inclusive, of shipments from northeastern States to southern and southwestern States showed that out of 1,326 cars, 122 were stopped off for partial loading or unloading, and of these only 12 cars, or less than 1 percent, were stopped in

intermediate territory beyond the reach of sea-land competition.

OTHER VALUE OF SERVICE CONSIDERATIONS. One of the principal considerations in the shippers' determination of the value of water carrier services is the uncertainty of the service due to the perils of the sea. This uncertainty will remain with any water carrier because of the uncertainty of the weather at sea, but no doubt the uncertainty will decrease in degree as the future brings on better weather-predicting methods and other technical advances.

Lower minimum weights available in instances in sea-land service and concurrent higher minima in railroad service at times will result in different inventory costs for some shippers. Also, in rail service there are extra charges for protective services against heat and cold, whereas in sea-land service such charges are included in the sea-land rates.

The railroads have the ability to handle oversized freight, whereas sea-land trailers are limited to articles about 34 feet long, and there are state highway weight limitations for trailers. So far as this record shows, little or none of this oversized freight is moving in the areas in which sea-land competes.

GENERAL DISCUSSION AND CONCLUSIONS. Only the sea-land rates of Pan-Atlantic, and not other rates such as the all-rail box-car and motor common-carrier rates, are under investigation herein. Pan-Atlantic emphasizes that it cannot exist without differential rates, that is, sea-land rates differentially lower than all-rail rates, and lower than all-motor common-carrier rates. The railroad protestants take the view that regardless of whether the Commission approves or disapproves the new sea-land rates there should be no prescription or order which would establish a relationship between the sea-land and the all-rail rates.

In I. & S. No. 6847, *Fresh or Frozen Foods—Sea-Land—Pan-Atlantic SS Corp.*, protestant, Southern Motor Car-

riers Rate Conference, Inc., requests findings that Pan-Atlantic has failed to establish that the proposed level of sea-land rates on frozen citrus juice concentrates is necessary for Pan-Atlantic to fairly compete with motor common carriers, that the motor common carriers depend for their very existence upon this traffic and will lose substantial tonnage to Pan-Atlantic through these rate reductions, that Pan-Atlantic will create destructive competition with resulting needless and wasteful dissipation of common carrier revenues, and that Pan-Atlantic has failed to establish that the proposed rates are reasonably compensatory.

The sea-land rates here in issue generally, with the exceptions previously noted, are reasonably compensatory. Nearly all of the rates exceed out-of-pocket costs, and about 70 percent cover fully-distributed costs. Aside from considerations of their effect on competitive rates of other modes of transportation, the sea-land rates as a whole are just and reasonable per se.

Section 307(f) of the Act provides that in prescribing just and reasonable rates by water, the Commission shall give due consideration to the effect of the rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed, to the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service, and to the need of revenues sufficient to enable water carriers, under honest, economical, and efficient management, to provide such service.

This section does not require that consideration be given to the effect of the rates upon the movement of traffic by carriers other than those for which the rates are prescribed. Pan-Atlantic contends that it should not be forced to charge rates higher than required by its operating costs and higher than it formerly charged with relation to the rates of competing carriers for the sole purpose of protecting the revenues of those competing carriers. Presently, the sea-land rates under investigation are differentially un-

der corresponding all-rail rates by lesser amounts than the differentials formerly maintained in connection with the break-bulk service of Pan-Atlantic. At the same time, Pan-Atlantic's costs of operation under its sea-land service are from \$10 to \$12 a ton less than those costs under its break-bulk service. The reductions in operating costs are mainly those at the terminals or ports. Pan-Atlantic, accordingly, states that the protestants which contend that Pan-Atlantic rates should be higher are in the anomalous position of urging that Pan-Atlantic be required to charge the shipping public more for an operation that costs Pan-Atlantic less to perform than its previous operation, and that the effect would clearly be to discourage betterments in transportation efficiency and to deprive the shipping public of the advantages in improved transportation methods.

Section 15a(3) of the Act provides that in a proceeding involving competition between carriers of different modes of transportation, in determining whether a rate is lower than a reasonable minimum rate, the Commission shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. The section is silent as to whether the facts and circumstances attending the movement of traffic by carriers of other modes of transportation may be considered, but the section does provide further that rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy.

It is declared national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each, to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several car-

riers, all to the end of developing, coordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of the Interstate Commerce Act shall be administered and enforced with a view to carrying out the declared national transportation policy.

The specific reference in section 15a(3) to the national transportation policy clearly qualifies the preceding clause in that section. The national transportation policy is meant to develop, coordinate, and preserve an adequate national transportation system by water, highway and rail, as well as by other means. The use of the word, "and", means that the system must be adequate by each of the several modes.

In the present proceedings we are concerned mainly with the rates of a water carrier and with the development and preservation of a national transportation system by water. Pan-Atlantic is one of only two deep-water common carriers operating in the Atlantic-Gulf coastwise trade. Disapproval of the rates under investigation herein would be very likely to force Pan-Atlantic out of this trade, especially since the record shows that not a pound of traffic is moving via Pan-Atlantic except at rates lower than rail rates. On the other hand, approval of the rates conceivably may lead to the considerable loss of traffic to the rail carriers and to the motor common carriers. Transportation by highway and rail also must be developed and preserved under the national transportation policy.

By the findings herein it is not intended that there be any prescription or approval of specific differentials or relationships of these sea-land rates under the all-rail rates. Thus, the railroads may make rate proposals in the future, and justify them according to the individual facts and circumstances of a particular situation. The same statement also applies to the motor common carriers.

In *Savage Application*, 265 I. C. C. 157, the future public convenience and necessity was found to require the operation by applicant as a common carrier, by self-propelled vessels, in the transportation of motortruck trailers, loaded or empty, and commodities generally, when loaded in motortruck trailers of motor common carriers, between the ports of Norfolk and Baltimore. Division 4 stated in the report therein that, where the advantages of two modes of transportation may be coordinated in order to promote an efficient transportation system, we should sanction the resulting service, due regard being given to the protection of the public and the existing carriers.

In the present proceedings, the sea-land service offers a coordinated service which is not entirely new, but is new in economy and efficiency insofar as the method of loading and discharging the vessels has been speeded up and changed compared with the old method used in the break-bulk service. This relatively new sea-land service should be encouraged and sanctioned under the national transportation policy, which requires the development, coordination, and preservation of adequate water transportation.

The Commission should find that 11 of the sea-land rates, including certain rates on empty barrels and bottles, canned goods, pulpboard and synthetic plastics, as shown in the footnote number 7, have not been shown to be just and reasonable; and that the other sea-land rates in at least about 458 instances are just and reasonable, and do not constitute an unfair or destructive competitive practice in contravention of the national transportation policy. An order should be entered requiring the cancellation of those rates found unlawful, and the proceeding should be discontinued.

7. Shipping carriers (empty barrels and bottles) from Daytona Beach, Fla., to Philadelphia, Pa., canned goods, from New Orleans, La., to Baltimore, Md., from New Orleans to Rochester, N. Y., from Gulfport, Miss., to Philadelphia, and from St. Francisville, La., to Miami, Fla., pulpboard from Bogalusa, La., to New York, N. Y., and from Kreole, Miss., to New Brunswick and Wharton, N. J., and New York, N. Y., and synthetic plastics from Baton Rouge, La., to Baltimore, Md., and Rome, N. Y.

APPENDIX A

RATES, COSTS, AND COST RATIOS

(Rates and costs in cents per 100 pounds; Ratios in percents; Min. weights in 1,000 pounds; SL is Sea-Land; OP is out-of-pocket; FD is fully-distributed; PA is Pan-Atlantic; MC is motor carrier; AR is all-rail.)

		<i>Sea-Land</i>		<i>OP Costs</i>			<i>FD Costs</i>			<i>Ratios SL Rates to Costs</i>		<i>All-Rail Rate and Costs</i>				<i>Ratios SL to AR Costs</i>	
		<i>Min.</i>	<i>Rate</i>	<i>PA</i>	<i>MC</i>	<i>Sum</i>	<i>PA</i>	<i>MC</i>	<i>Sum</i>	<i>OP</i>	<i>FD</i>	<i>Min.</i>	<i>Rate</i>	<i>OP</i>	<i>FD</i>	<i>OP</i>	<i>FD</i>
Frozen fruit concn.	Dade City, Fla.-	36*	159	55.2	53.7	108.9	63.9	79.9	143.8	146	111	36	168	165.3	196.3	66	73
	Boston, Mass	80*	141	55.2	53.7	108.9	63.9	79.9	143.8	129	98	120	145	64.6	95.7	169	150
Citrus pomace w/o syrup	Tampa, Fla.-	40	106	52.0	39.6	91.6	60.2	55.5	115.7	116	92	40	112	95.3	127.3	96	91
	Boston, Mass.	80@	92	52.0	39.6	91.6	60.2	55.5	115.7	100	80	60	97	70.4	102.4	130	113
Synthetic plastics	Baton Rouge, La.-	70#	128	58.4	41.8	100.2	67.6	62.9	130.5	128	98	70	133	64.4	95.7	156	136
	Berlin, Conn.	40	161	51.1	38.4	89.5	59.2	59.5	118.7	180	136	—	—	—	—	—	—
Aluminum articles	Massena, N. Y.-	30	228	73.8	119.7	193.5	85.5	157.8	243.3	118	94	30	241	142.6	180.2	136	135
	Dallas & Ft. Worth, Tex.	40	214	55.7	98.3	154.0	64.5	136.4	200.9	139	107	40	208	112.5	150.0	137	134
Coffee	Freehold, N. J.-Jax, Fla.	30	124	49.7	71.7	121.4	57.5	100.3	157.8	102	79	30	131	84.9	107.5	143	147
Copper rods	Bayway, N. J.-Tampa, Fla.	40	129	64.6	—	64.6	74.8	—	74.8	200	172	40	140	75.9	100.3	85	75

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WEIGHTS USED IN COMPUTING COSTS:

- *—35,000 Pounds used because of max. load per trailer in refrigerated vans in New Jersey—Docket I. & S. No. 6985.
- #—35,000 Pounds used as load per trailer when two trailers used for 70,000 pounds.
- @—40,000 Pounds used as load per trailer when two trailers used for 80,000 pounds.

APPENDIX B

RATIONALE OF COST FINDING SECTION

Pan-Atlantic's cost studies and criticism of protestants' cost evidence:

The Pan-Atlantic costs consist of steamer costs, stevedoring costs, port charges, interest and depreciation charges on trailer vans, pickup and delivery costs, and overhead expense. The steamer costs were computed for a representative voyage based on a 14-day roundtrip schedule. The costs for the voyage were divided by the average ton-miles per voyage to obtain a cost per ton-mile. The ton-miles were based on the average tons and distances per voyage for 5 full voyages operated during the latter part of 1957 in the sea-land service. The cost per ton-mile was reduced to an out-of-pocket basis by applying a factor of 75 percent to the total. The factor of 75 percent was based on the fact that the first 5 vessels for which costs were developed had a 75 percent load factor, that is, 75 percent of the trailer vans carried were loaded and 25 percent carried were empty. Respondent contends that any additional amount of tonnage above that actually handled by the first 5 voyages could have been handled without any additional vessel expense. The out-of-pocket costs per ton-mile were then multiplied by the actual distances between ports to obtain the port-to-port cost per ton which was converted to a cost in cents per 100 pounds.

The stevedoring expenses include the cost of operating the cranes on the ships by longshoremen, the cost of loading and unloading the vans, and the hauling of the vans with tractors to and from the parking lots adjacent to the dock, and the wages of supervisory forces. The stevedoring costs were based on the actual number of longshoremen needed to load and discharge the traffic at each port of call during the operation on which the cost study was based. Stevedoring costs also include depreciation and the interest paid on the purchase price of tractors and chassis used in

hauling the boxes between the ships and parking lots. The stevedoring expense was related to the weight handled to obtain a cost per 100 pounds. An out-of-pocket level was obtained by applying a ratio of 90 percent to the total in order to reflect the fact that certain costs for the tractors and supervisory expenses are not 100 percent variable with changes in traffic volume as are the costs for longshoremen.

Port charges include pilotage, tug hire, handling lines, wharfage and dockage. Costs were based on the actual expense incurred on the first 5 voyages operated in the sea-land service in the latter part of 1957. Costs for those ports not served at the time the voyages were operated were developed on the basis of past experience for other ports for the volume of traffic estimated to be handled. Port charges were related to the weight handled at each port to obtain a cost per 100 pounds. The same level of out-of-pocket cost as was used for the vessel expenses, namely 75 percent, was applied to the port charges, for the same reasons given under vessel expense. A cost for the interest and depreciation on trailer vans, excluding chassis while being transported port to port, was included. The depreciation was based on a 10-year service life with a 10 percent salvage value and was developed separately for refrigerator vans and for general cargo vans, as the cost of the former is greater and the utilization less. The out-of-pocket costs for the depreciation and interest on the vans was based on 75 percent of the total, the same as for vessel expense. The out-of-pocket costs were related to the active van days, 200 days per year, for refrigerator vans and 250 per year for general cargo vans, to obtain a cost per active van day. The costs per active van day were then multiplied by the days between ports plus one day in the loading port and one day at the discharge port to obtain the cost between ports.

The Pan-Atlantic motor terminal pickup or delivery cost includes all costs of terminal operation for the pickup and delivery and interchange of the trailer vans. Since these proceedings concern the cost of handling truckload

shipments only, the cost for handling truckload shipments at the motor terminals was developed separately from the less-truckload, and for this purpose special studies were made during a week in December, 1957, at Port Newark, Houston and Tampa. Costs were developed for pickup or delivery service by Pan-Atlantic and for the interchange of truckload shipments with connecting motor carriers. The pickup and delivery and interchange costs per truckload were related to the weight per shipment to obtain a cost per 100 pounds which reflects the difference in cost for the varying loads. An out-of-pocket level was developed by applying a ratio of 96 percent to the total expenses in order to reflect the fact that not all pickup and delivery or interchange expenses are directly variable with traffic volume.

Overhead expenses applicable to the Pan-Atlantic sea-land services were based on the overhead expenses for both the Pan-Atlantic and Waterman Steamship Company operations. Based on 1956 operations the ratio of overhead to total expenses was 9 percent and for the first 9 months of 1957 it was 8.2 percent. For this proceeding a figure of 10 percent was applied to all Pan-Atlantic costs to include an allowance for overhead.

Fully distributed costs for Pan-Atlantic operations were developed by dividing the full costs, including overhead, by an operating ratio of 95 percent. The figure of 95 percent was used in order to provide an adequate allowance for return because of the fact that the total operating expenses, taxes and charter hire absorb a very large percentage of total revenues. Respondent contends that the computation of an allowance for return based on the depreciated book investment does not give adequate recognition to Pan-Atlantic's revenue needs because of the relatively small size of the carrier's investment resulting from payment of rents and charter hire for the use of facilities and vessels.

The connecting lines motor carrier costs were developed for representative carriers in 4 regions. The costs

were developed for a group of 7 carriers in the New England region; 8 carriers in the Middle Atlantic region; 4 carriers in the Southern region; and 6 carriers in the Southwest region by applying a cost formula known as Highway Form B, 8-55, Statement No. 3-55 of the Bureau of Accounts, Cost Finding and Valuation to the 1956 expenses and statistics for each group of carriers. The costs based on 1956 expenses were adjusted to a more current basis by applying a ratio of cost per ton for the first 3-quarters of 1957 to a cost per ton for the first 3 quarters of 1956. The line-haul cost per vehicle-mile was increased by 6 percent to allow for circuitry and was converted to a cost per hundred-weight-mile based on the average of the weight per shipment concerned and the round-trip load factor experienced by each carrier group in the handling of Pan-Atlantic's sea-land traffic. The round-trip load factor was obtained from a special study prepared by the motor carriers. The average pickup and delivery expense per hundred pounds was adjusted for the specific weight per shipment by the factors shown in the cost formula. The billing and collecting expense per shipment was divided by the weight per shipment to obtain a cost per 100 pounds. Platform expense was not included since the sea-land truckload traffic normally does not receive this service. The Highway Form B formula does not provide for the development of interchange expense separately from pickup and delivery expense, so respondent computed the interchange expense by taking one-half of the pickup or delivery cost. The factor of 50 percent was based on studies made by the Cost Finding Section of the Commission which showed that the expense of interchange was approximately one-half of the cost of pickup or delivery service. Where shipments exceeded the maximum weight capacity per van of 40,000 pounds but were less than 80,000 pounds motor carrier costs were based on an average load of 36,000 pounds. Out-of-pocket expenses were computed on a 90 percent of total basis as called for in the cost formula.

The motor carrier fully distributed costs were developed as prescribed in the cost formula except that respondent adjusted the constant terminal expense for size of shipment in the same manner as the out-of-pocket pickup and delivery expenses were adjusted, and that an operating ratio of 95 percent instead of 93 percent was used. The ratio of 95 percent is said to reflect more closely the actual operating ratio experienced by the carriers in the study.

Respondent developed rail boxcar costs for those movements where the rail carriers published a rate for the items proposed by Pan-Atlantic. Originally respondent used I. C. C. Statement No. 1-57 of the Bureau of Accounts, Cost Finding and Valuation as a source for its rail costs. These costs were based on expenses for the year 1955 and were adjusted by respondent for a level of wages and prices as of January 1, 1958, using a method similar to that used by the Cost Finding Section. Costs were developed for the Eastern and Western districts and the Southern region, and were applied to the rail movements in the respective areas. Subsequently respondent restated its Exhibit No. 7 in I. & S. Docket No. M-10415, et al., with the rail costs based on those shown in I. C. C. Statement No. 2-58, which provides costs based on the year 1956 and adjusted for wages and prices to a January 1, 1958 level. In its restatement respondent also costed the traffic moving through the Pocahontas region with Pocahontas region costs rather than Southern region costs. The rail costs in the corresponding Exhibit No. 7 of I. & S. Docket No. M-10698, et al., were not restated.

The rail costs reflect the tare weight of the car, allowance for empty return, net weight of load, and they include an allowance for circuitry of 13 percent over the short-line distance. For boxcars the tare weights were based on the territorial averages as shown in Statement No. 1-57. For refrigerator cars a tare weight of 40 tons was used which is supposed to reflect the additional weight of mechanical refrigerators which are used for the frozen food traffic. The

source of the 40-ton figure was not disclosed. The rail costs were developed on an out-of-pocket basis and on a fully distributed basis. The out-of-pocket portion includes 80 percent of operating expenses, rents, and taxes, plus 4 percent return on all of the equipment investment and on 50 percent of the road property investment. The fully distributed cost includes the out-of-pocket cost plus the remaining constant costs with the terminal portion of constant costs distributed over the revenue tons and the line-haul portion distributed over the revenue ton-miles. The rail costs include an allowance for loss and damage claim payments. Costs were not developed for the competitive movements by motor carriers or by the Seatrain lines.

Protestants' cost studies and criticism of respondent's cost evidence:

The protestant rail carriers introduced restatements of respondent's cost evidence which reflected the following changes: Protestants based the water costs on the experience of 5 voyages subsequent to those used by respondent and which showed somewhat lower average loads than the first 5 voyages; vessel expenses were taken to be 100 percent out-of-pocket; the fuel costs were based on the consumption of fuel while at sea for both the time at sea and in port; and the crew wages and corresponding taxes were increased for a greater allowance for overtime than that used by respondent. The rail costs were restated to reflect the expenses as of January 1, 1957, instead of January 1, 1958, and movements through the Pocahontas region were costed at the Pocahontas region costs instead of Southern region costs. In addition to costs for the rail carload minimums, costs were shown for maximum loads which could be carried. Protestants' rail costs made no allowance for loss and damage claim payments. Although protestants contend that the rail costs as of January 1, 1957, are appropriate, a subsequent exhibit was introduced in I. & S. Docket No. M-

10698 showing rail costs based on I. C. C. Statement No. 2-58, showing rail costs as of January 1, 1958. In its exhibits protestants showed the rail out-of-pocket costs for all items corresponding to those where rail costs were computed by respondent. The fully distributed costs were shown for only a selected 20 percent sample. Protestant, Sidney Alterman, President of Alterman Transportation Lines, Inc., a motor common carrier engaged predominantly in the transportation of perishable commodities, entered a number of exceptions to respondent's cost study. He stated that based on his company's experience the life of refrigerator trailers would not exceed 6 years, the refrigerating unit would not exceed 3 years, and the insulation would have to be renewed every $2\frac{1}{2}$ years. He questioned the use of 10 percent salvage value on refrigerated boxes and the representativeness of the motor carriers included in the study by respondent which reflects general cargo carriers rather than carriers of refrigerated traffic. In response to criticisms of protestants, respondent placed in evidence an exhibit describing the construction of the vans and the refrigerating units. The vans are especially designed for the sea-land service and are built using heavy gauge materials and aircraft type construction. Nonabsorptive insulation is used throughout thus eliminating the need for renewal. The steel hardware is cadmium plated and special insulated tape is used at junctions of steel and aluminum to prevent corrosion. The refrigerating units are also especially designed for long life and make use of the largest compressors available from the manufacturers of the unit and include other special features to insure long life. As an example of the life expectancy of its vans, respondent's witness cited the use of similar type containers which have been carried on ocean going barges between ports in Alaska and Seattle and which were still in use after 7 years of service. It would appear, therefore, that the use by respondent of 10 years in depreciating the trailer vans is not unreasonable. Respondent's witness also stated that the scrap value of the

aluminum alloy used in the trailer bodies comprises a large part of the salvage value taken as 10 percent of the cost of the vans.

Cost Finding Section's Comments on Pan-Atlantic's cost studies and criticisms:

Respondent stated that its own costs were all inclusive. However, the record does not provide the basic data to verify this statement, and respondent's annual report does not show the expenses for the sea-land service separately from the total expenses for all services operated by Pan-Atlantic. The Commission should require that this separation with a proper allocation of overhead expense to the sea-land service and appropriate statistics be shown in respondent's annual report to the Commission so that in any future proceedings involving sea-land costs the basic expenses used by respondent may be verified. The costs were based on a 14-day round voyage covering 4 ports. Commencing at Houston, a vessel would stop at Tampa, Port Newark, Miami and then return to Houston. Costs based on this operation were applied to voyages which included stops at New Orleans, Mobile, Philadelphia and Jacksonville. According to the schedule introduced in I. & S. Docket No. M-10698, Exhibit 1, Appendix X, two different sets of voyages are now in operation. One schedule provides for direct service between Port Newark and Houston with no intermediate stops. Another schedule provides service from Port Newark via Miami to New Orleans and return via Tampa to Port Newark. Both schedules provide for a 14-day round trip. The effect of the change in schedules on the consist of traffic and costs is not shown in the record.

In developing the vessel expenses respondent failed to provide a separation of expense between the time the vessel was in port and the time the vessel was at sea but instead related all vessel expenses directly to ton-miles. This treatment results in understating the costs for shorter-than-

average hauls and in overstating the costs for longer-than-average hauls. From data available in the underlying working papers, it appears that for the 14-day voyage used for developing the costs, the time in port amounts to about 19 percent of the total. Where additional stops would be made this percentage would be even greater. The cost for the time in port should have been related to the number of loaded vans handled. The cost for the vessel while at sea should have been related to the loaded van-miles rather than the ton-miles in order for the final costs to reflect properly the different weight loads in each van.

Respondent used a factor of 75 percent for developing its vessel and port out-of-pocket expenses based on the utilization of the vans per voyage at the time of the cost study. Respondent feels that 100 percent utilization would be possible without additional vessel expense, and that, therefore, the 75 percent level of cost reflects what the cost would be if a 100 percent level of utilization were reached. This contention is not realistic in view of the manner in which the trailer-ships are operated. To reach 100 percent capacity on every voyage a perfect balance of traffic between northbound and southbound and between all ports would have to exist. Furthermore, because of the manner in which a vessel stops at intermediate ports only once during a round voyage, it is apparent that some traffic is back haul in nature, thus preventing complete utilization of vans between each port. Respondent fails to recognize the fact that if the traffic available were to double that additional vessels would be required. Thus, over a long period the vessel costs would vary almost directly with traffic volume. In the absence of evidence justifying the use of a load factor greater than that actually experienced on the 5 test voyages, it is believed that the cost should be based on the loads actually experienced rather than on 100 percent utilization which is reflected by use of the factor of 75 percent. Because data necessary to determine the out-of-pocket cost of vessel and port operations are not available, the

Cost Finding Section believes that the direct expenses before the addition of overhead is justified for use as an out-of-pocket level and this has been used in the restatement of respondent's water costs by the Cost Finding Section.

Respondent used the ratio of general overhead to direct expenses based on operations of both Pan-Atlantic and Waterman Steamship companies combined. Although the overhead expenses may not be readily separable as between the two companies and for the sea-land operations specifically, the proper amount of overhead to be allocated to the sea-land service can be obtained by special studies. In view of the unique type of operation represented by the sea-land service, it would seem that the latter procedure would be preferable to the use of an overall overhead ratio.

Respondent shows the cost of depreciation and interest on the cargo vans separately for refrigerator vans and general cargo vans, but it does not show the additional expense of operating the refrigerator vans either while in the terminal or on board the ship. Although such an expense is included in the total cost and apparently spread over all traffic, it would be preferable to reflect this expense separately.

Although respondent contends that it is its practice to top load those vans with less than average weights per shipment, it should be apparent that this is not always possible or practicable to do. For example, in the case of frozen foods or in the case of radios and television sets or other low density freight, it is unlikely that top loading would be practicable or even possible. A witness for the respondent testified that at Jersey City 35 percent of the local sea-land pickups of truckload freight received additional loading at the terminal, one truckload or volume shipload was handled per van and that top loading consisted of less-truckload freight. So far as the Jersey City terminal is concerned it would appear that in some instances it would be practicable to top load a volume shipment with another

volume shipment, in which case, an allowance for platform handling should be included.

In its restatement of respondent's costs the Cost Finding Section has given recognition to the fact that top loading of some low-weight truckload shipments is practiced by respondent. Where such additional loading has been considered to be feasible the average load experienced by respondent of 36,000 pounds has been used for computing the water line-haul cost instead of the minimum weight per shipment for shipments under 30,000 pounds. The average load of 36,000 pounds is used for all items where allowance is made for top loading because the record does not provide the average loads at which the various commodities actually moved. Allowance for heavier loading based on the latter information would be preferable. For those items where heavier loading would appear to be possible but where comparative rail costs have been computed for the same or approximate minimum weight per shipment, the water line-haul cost has been based on the minimum weight per shipment in order to provide comparability with the rail costs.

Respondent also contends that the connecting motor carriers top load the lighter weight shipments. The degree to which this may be practiced is not shown in the record. Therefore, in its restatement of respondent's connecting motor carrier line-haul costs, the Cost Finding Section has based those costs on the minimum weight per shipments weighing up to 40,000 pounds. In its treatment of pickup and delivery expense respondent assumed an average weight of 36,000 pounds in many instances for shipments weighing in excess of 40,000 pounds, the maximum capacity of a van. This ignores the pickup or delivery cost for the remaining weight of the shipment. The Cost Finding Section believes that where a pickup or delivery cannot be made by the use of one cargo van, the pickup or delivery weight should be based on the weight of the shipment divided by the least number of cargo vans required to provide such service. Thus, a 50,000-pound shipment would require

two vans and the pickup or delivery service would be costed at 25,000 pounds.

In computing the pickup and delivery and interchange expense for the connecting motor carriers, the respondent used the cost for pickup *or* delivery as the cost for pickup *and* delivery. The result was to understate the pickup and delivery and interchange costs by 50 percent. In a revised exhibit respondent adjusted these costs upward but still did not reflect the proper cost for interchange of one pickup or delivery plus 50 percent. In the Cost Finding Section's restatement of respondent's costs, the pickup and delivery and interchange expense has been corrected for this error.

In the development of constant expense for motor carriers respondent adjusted the constant terminal expense by the same factors used to adjust the pickup and delivery out-of-pocket costs for various weight brackets. This is incorrect since the constant expense per 100 pounds applies equally to all sizes of shipments and should not be further adjusted.

In its brief respondent contends that the all-rail costs, including those introduced by respondent, should not be compared directly with the sea-land costs because:

1. All-rail costs and sea-land costs are based on different periods.

2. All-rail costs are based on territorial averages while sea-land costs reflect specific conditions. Use of territorial average rail costs understates terminal expense for the large metropolitan areas.

3. Sea-land costs are affected by, among other things, the amount of connecting motor carrier haul and the presence and existence of a back haul in the connecting carrier movement.

4. At the higher weights methods of operation between sea-land and rail is radically different.

The Cost Finding Section feels that respondent's contention that the rail costs should not be compared directly with the sea-land costs has little merit for the following reasons:

1. The record shows that respondent adjusted the rail costs to a January 1, 1958, level of wages and prices to provide comparability with the sea-land costs computed for a 1957 level.

2. If respondent believed the rail terminal costs for the large metropolitan areas to be understated it should have endeavored to adjust the costs for such understatement. The large rail terminals are involved in many of the comparative all-rail movements, but there are also many movements involving small and medium size terminals. If costs are to be adjusted upward for the large terminals, they should be adjusted downward for the small terminals.

3. The fact that sea-land costs are affected greatly by the length of connecting motor carrier hauls and by back hauls of the connecting motor carriers are natural results of its type of operation. Merely because the rails do not share the same disabilities is no reason that the costs should not be compared.

4. The costs for higher weight shipments reflect the operating conditions or advantages for each mode of transportation. Because the railroads are able to obtain twice the weight load or more in a boxcar as can be loaded in a sea-land van without substantially increasing the cost is no reason why direct comparison of costs is invalid.

Cost Finding Section's comments on protestants' cost studies and criticism:

The out-of-pocket level of expense for the water movement has been discussed previously herein. In reply to protestants' use of 5 later voyages for computing water

costs respondent stated that there were 4 even later voyages which operated in excess of 75 percent loaded and that the average for the 14 voyages, excluding the 5 used by respondent amounted to 75.5 percent, which is roughly the same as the average of the voyages used by respondent. Considering the above facts, respondent's use of the original 5 voyages for development of the tonnage handled is considered to be proper. Respondent has shown the fuel cost at sea to be considerably different from the fuel cost in port and protestant is in error in not reflecting the difference in this cost. Tests made by respondent and based on actual operating experience show that an allowance for overtime of 45 percent rather than 50 percent used by protestants is proper.

In view of the fact that the Pan-Atlantic costs were based on operations in the later part of 1957 and motor carrier costs were adjusted to a 1957 level, protestants' contention that rail costs as of January 1, 1957, are proper is difficult to justify. The fact that protestants subsequently introduced rail costs for I. & S. Docket No. M-10698 based on I. C. C. Statement No. 2-58 which reflect a level for wages and prices as of January 1, 1958, would tend to nullify the contention that the costs for the earlier period were appropriate. As noted previously respondent also restated the rail costs for the movements in I. & S. Docket No. M-10415, et al. based on Statement No. 2-58. Unfortunately it did not do so for the movements in I. & S. Docket No. M-10698. Protestants' rail costs in I. & S. Docket No. M-10698 are deficient in that the fully distributed expenses are shown for only a limited number of items. Therefore, in order to provide both out-of-pocket and fully distributed costs for all items in its own restatement of respondent's costs, the Cost Finding Section has used the rail costs from respondent's Exhibit 123 in I. & S. Docket No. 10415 and from Exhibit 7 in I. & S. Docket No. M-10698. Although protestants' rail costs in I. & S. Docket No. M-10698 are somewhat lower than those shown by re-

spondent, the difference is not considered enough to greatly affect the comparative results. Protestants' rail costs are further deficient in that they do not include allowance for loss and damage claim payments.

Respondent acknowledged that the use of Pocahontas region costs were proper for movements through that region and used such costs in its restated exhibit. In reply to protestants' contention that rail costs should be based on maximum possible loads, respondent introduced an exhibit based on I. C. C. waybill studies for the year 1956 which showed actual loads per car to be considerably less than the maximum loads shown by protestants. The use of maximum possible loads for costing purposes has little value as it is the actual load at which the traffic moves that determines the cost per 100 pounds.

Concerning the representativeness of the motor carriers used in its cost study respondent stated that it computed costs for the principal motor carriers which handle sea-land traffic although one of the larger connecting carriers was omitted because adequate cost data were not available for that carrier. Respondent admitted that costs for carriers handling frozen food would be somewhat higher than those for general commodities but stated that the difference in cost would not be large enough to change the results of the study because the revenues from the frozen food traffic greatly exceed the costs. As a rough indication of what the increased cost of frozen foods would be, based on total expense per vehicle-mile, respondent computed the overall expense per vehicle-mile for 5 carriers of refrigerated food to be 35 cents. This amount is 4 cents per vehicle-mile greater than the average line-haul cost alone of 31 cents per vehicle-mile for the 25 carriers used in respondent's cost study. The actual cost per vehicle-mile would be somewhat less because the 35-cent figure includes terminal cost as well as line-haul cost. Although respondent should have included an allowance for the cost of operating the refrigerator vans while in possession of

the motor carriers, the Cost Finding Section believes that the motor carrier costs used by respondent in its cost presentation are sufficiently representative for purposes of these proceedings.

Conclusion:

A comparison of the proposed rates with the restated sea-land costs shows that for most movements the proposed rates exceed the costs. A comparison of the sea-land costs with the all-rail costs shows that for most movements where rail costs are shown, the sea-land costs exceed the all-rail costs. This latter relationship is more pronounced at high minimum weights.

218. [Clerk's certificate to foregoing transcript omitted in printing.]

219. In United States District Court, District of
Connecticut

Civil action No: —

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, ET AL, PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, DEFENDANTS

Complaint.

Filed February 1, 1961

I

The Plaintiffs herein are The New York, New Haven and Hartford Railroad Company, a corporation of the State of Connecticut, having its principal place of business in that state, and the other railroads named in Appendix A which is attached hereto and made a part hereof. These railroads will be referred to as the "Railroads" or as Plaintiffs.

II

This complaint is brought under, and the jurisdiction of this Court is conferred by, the provisions of 49 U.S.C. § 17(9); 28 U.S.C. §§ 1336, 1398, 2284, 2321 to 2325; and 5 U.S.C. § 1009. It is a civil action to enjoin, set aside and annul a report and order of the Interstate Commerce Commission, hereinafter referred to as the Commission. This report and order which embraces several Commission dockets is entitled: Investigation and Suspension Docket No. M-10415—Commodities—Pan-Atlantic Steamship Corporation. A copy of this report and order is attached hereto and made a part hereof and is marked Appendix B. It will be referred to as the report and order of the Commission.

The Plaintiffs were parties in the proceedings before the Commission which culminated in its report and order which was served on January 5, 1961.

IV

Prior to 1957 Pan-Atlantic Steamship Corporation, now Sea-Land Service, Inc., which will be referred to as Pan-Atlantic, operated conventional break-bulk coastwise and intercoastal steamship service along the Eastern seacoast and between ports on that coast and the Gulf of Mexico for the transportation of freight. In this service the freight was transported by railroad or by motor truck to the pier where it was unloaded. The freight was then reloaded by slings and other stevedoring methods into the ocean-going steamship. At the destination port the process was repeated, the freight being unloaded from the ship to the pier and then reloaded into trucks or rail cars for delivery to the ultimate consignees. This type of operation was slow, and inefficient because it resulted in excessive cargo damage and pilferage and was unduly expensive both to Pan-Atlantic and its customers. This type of operation was the standard in the coastwise and intercoastal trades, the single exception being Seatrain Lines, which transported loaded rail freight cars on its ships. Seatrain has the service disabilities inherent in any transportation utilizing rail boxcars namely the expense incurred by the shippers and consignees in loading and unloading the freight, the necessity of large amounts of blocking and shoring to prevent damage to the lading and, despite the presence of blocking and shoring, the damage that inevitably occurs from the switching and shifting of rail cars. In addition, if the shippers and consignees are not located on rail sidings, there is the expense of draying the freight from the shippers' or consignees' platforms to the railroad siding.

In 1957, after some preliminary experimental ventures, Pan-Atlantic inaugurated a new and different type of water carrier service between the Northeastern and Eastern parts of the United States on the one hand and the Southeastern and

Southwestern parts on the other. A container was developed which could be attached to a highway chassis making the combination the counterpart of the ordinary trailer used by the interstate motor carriers of general freight. These containers, when loaded, are easily detached from their chassis and are transferred with their lading intact by cranes installed on the Pan-Atlantic ships to their holds or decks. At the destination port the process is reversed—the fully loaded containers are lifted from the ships and placed on highway chassis and thereafter as highway trailers are moved to the consignees' platforms. This service, from the standpoint of its transportation characteristics, is virtually the same as that offered by the interstate motor carriers. The freight moves directly from the shippers' platforms to the consignees' platforms without being unloaded. Damage and pilferage is eliminated and more important, from the standpoint of its competitive impact, since the container is a highway vehicle, service can be rendered to all shippers and consignees regardless of whether they are located on or near a railroad. Pan-Atlantic is thus in a position to offer its new service—which it has named Sea-Land 222 Service—not only to shippers and consignees in the port cities at which it calls, but to customers located throughout a vast hinterland emanating from the port cities. This service is explained in some detail at Pages 3-7 of Appendix B.

V

In an effort to attract customers to its new Sea-Land Service, Pan-Atlantic widely advertised its superior features emphasizing that it offered the advantages made available by the motor carriers. In addition, pricing was proposed by the publication of motor-water-motor rates which undercut the rail rates for the movement of freight in boxcars between corresponding points by 5 to 10% in most instances and by greater percentages in other instances. Railroads, in the belief that Sea-Land was in fact, quality-wise, the equal of motor carrier service and therefore superior in quality to their own rail boxcar services, were greatly concerned that the discounted pricing proposed by Pan-Atlantic would compel them to reduce their

rates to remain competitive. This prospect was a disturbing one because the Railroads, burdened with increasing wage and material expenses, needed to keep their own pricing at the highest levels which would be competitively feasible. They therefore petitioned the Commission, which has statutory powers to regulate motor-water-motor rates, to suspend the proposed Pan-Atlantic rates and to place them under investigation to determine their lawfulness. In some instances the Pan-Atlantic rates were suspended and placed under investigation, and in other instances they were merely placed under investigation but allowed to become immediately effective. The report and order of the Commission, which is complained of here and which is Appendix B of this Complaint, deals with
 223 over 700 of these reduced Pan-Atlantic rates. The rates that were under suspension are now in effect, the suspension period having long since expired.

VI

After the World War II economic upheaval had subsided and conditions had begun to assume more normal patterns, the Railroads found that increasing amounts of their traffic were being diverted to other forms of transportation, principally to the over-the-road motor trucks. To combat this trend, new techniques in railroad transportation were diligently explored. One of the new techniques that offered the greatest promise was trailer-on-flat-car service, referred to as piggy-back or TOFC. In this service highway trailers—or containers that are readily convertible into highway trailers—are used to pick-up and deliver freight. After the freight is loaded into the trailer, it is moved over the highways to a centrally located rail terminal where the loaded trailer, without the power unit, is placed upon a railroad flat car. Usually two trailers are placed on one car. These flat cars, with the highway trailers on them, are moved in a freight train to another terminal convenient to the particular consignee's place of business. There the trailer with the load intact is moved over the highways to the consignee's door. By this combined type of operation, the inherent economics of long-haul rail transportation can be realized for the greater part of the movement, and the superior quality

224 features of motor carrier transportation which largely exist in picking up and delivering the freight, can be enjoyed by the Railroads' customers. TOFC service, which has many of the quality features offered by the motor carriers, has to some extent stemmed the erosion of railroad traffic to highway competitors.

In June of 1956 the Railroads inaugurated TOFC service between the Eastern and Southwestern parts of the United States. Since the service was the equivalent in many respects of that offered by the motor carriers, the rates were generally on parity with those of the motor carriers. Traffic for this new TOFC operation was slow in developing. When Pan-Atlantic inaugurated its new Sea-Land Service between the East and the Southwest late in 1957, TOFC in that field was confronted with a competitor which offered service of virtually identical quality—for it, like TOFC, moves the freight in highway vehicles with the only difference being that for the inter-city movement Sea-Land hauls the trailers on a vessel whereas TOFC utilizes a rail car between cities—but which had pricing well below that of TOFC. This was so because the TOFC rates were on a level of the motor carrier's which was generally higher than that of the rail boxcar rates, while the Sea-Land rates were generally 5 to 10% below the rail boxcar rates. Thus, except in rare instances, the TOFC rates were well above 10% higher than the corresponding Sea-Land rates.

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VII

Based on field studies which included surveys of the users and potential users of TOFC, the Railroads were convinced that TOFC could not compete with Sea-Land unless the pricing for the two services was substantially identical. They decided, therefore, that the TOFC rates would have to be reduced. Doing this presented difficulties because of the inter-relationship between the TOFC rates, the rates of competing motor carriers and the rates of their own conventional boxcar services. In order to create the minimum of disturbance to this complex pricing relationship, it was determined that a limited reduced pricing test should be put into effect for the

TOFC operation between the East and the Southwest. A pilot group of rates were published from a few Eastern origins to two Texas cities, Dallas and Fort Worth, on parity with the Sea-Land rates between the same points. The remainder of the TOFC rates between the East and the Southwest were not reduced. It was believed that this pricing sample which included only 66 individual commodity rates would provide the experience for an informed judgment as to what should be the proper relationship between the TOFC and Sea-Land pricing.

VIII

Pan-Atlantic petitioned to have this TOFC pricing experiment suspended. Other petitions for suspension were filed by SeaTrain Lines and the motor carriers. The rates were suspended and placed under investigation. These rates are not in effect today, the Railroads, having agreed to the continuation of the suspension pending the Commission's consideration of their lawfulness. One of the factors which prompted the Railroads to agree to the continuation of the suspension was the need for relief pursuant to Section 4 of the Interstate Commerce Act because the reduced TOFC rates resulted in some instances in charges for the longer hauls being somewhat less than for intermediate shorter hauls. Without Fourth Section Relief it would have been necessary to reduce the intermediate rates which would have resulted in the limited TOFC pricing experiment being greatly broadened. As of the time the record was closed, both because of the continuation of the suspension and the extremely limited scope of the TOFC pricing experiment, the Railroads between the East and the Southwest had no TOFC rates in effect as low as or approaching the level of the reduced Sea-Land rates and as a consequence were handling little or no traffic in TOFC service between the East and the Southwest.

IX

After extended hearings at which 65 shippers and receivers of freight testified regarding the quality of the several involved services, and at which considerable testimony was submitted

regarding the relative costs of the several transportation agencies in providing their services, briefs were submitted to the Hearing Examiner. He issued four recommended reports and orders dealing with the several dockets in which the Pan-Atlantic and TOFC rates were being considered. After a consideration by one of the divisions of the Commission of

most of the Pan-Atlantic rates, and after the parties had
 227 filed appropriate pleadings with respect to the Examiner's recommendations regarding the TOFC rates, the

entire Commission, with one position being vacant, after hearing oral argument, served the report and order which is Appendix B of this Complaint. In this report five commissioners join in the "majority" opinion. The remaining five commissioners submitted three separate opinions, one of which is designated as "concurring" and another "concurring in part." The third opinion in which three commissioners joined is designated as "dissenting in part." In the majority opinion all of the Sea-Land rates which are found to be compensatory, that is those that exceed out-of-pocket costs, are also found to be just and reasonable. This includes all but a few of the 700 or more Sea-Land rates under investigation. None of the other opinions dispute this determination. But the majority opinion, although finding that the TOFC rates are compensatory, concludes that they have not been shown to be just and reasonable and orders them cancelled, ". . . without prejudice to the filing of new schedules in conformity with the conclusions herein."

The conclusions referred to by the majority are its earlier statements (P. 34, Appendix B) ". . . that the objectives of the national transportation policy require the establishment and maintenance of a differential relationship between the rates under investigation on sea-land and Seatrain Service, on the one hand, and the rates of the rail carriers, on the other . . ." and that the TOFC rates ". . . should be maintained on a level no lower than 6% above Pan-Atlantic's sea-land rates, so long as the latter are not increased above their present levels." The majority opinion which apparently fixes a differential in favor of the Sea-Land rates in the amount of 6% when compared with the Railroads' TOFC rates also appears to compel the Railroads to establish TOFC pricing, not upon the trans-

portation characteristics of that service but rather, upon how Pan-Atlantic elects to price its service.

228

X

In a separate opinion Commissioner Hutchinson states that he is in general agreement with the majority presumably only to the extent that the Sea-Land rates are found lawful and the TOFC rates found unlawful. His basis for a finding of unlawfulness in the case of the TOFC rates is that the cost of providing TOFC service is higher than Sea-Land and therefore the TOFC rates should be maintained on higher levels than the Sea-Land rates. With respect to the prescription of the 6% differential, he states:

"I am not convinced, however, that a differential of 6% is warranted on this record, but since I do not believe the 'without prejudice' finding constitutes an effective prescription of a differential, I concur in the majority decision."

XI

Commissioner McPherson concurs in the majority report to the extent that it finds the Sea-Land rates reasonable. He, however, would find lawful the TOFC rates which are compensatory and would prescribe no differentials.

XII

Commissioners Freas, Winchell and Webb dissent from the majorities' conclusion prescribing the 6% differential and hold that the Commission, on the record before it, is without power to prescribe any differential in favor of Sea-Land as compared with TOFC. Further these dissenting Commissioners state that there are no subsidiary findings in the report to substantiate any specific differential.

229

XIII

The Railroads complain that the report and order of the Commission is unlawful for the following reasons:

A. The Commission is without power on the record before it to prescribe or otherwise establish differentials which will com-

pel the Railroads to price their TOFC services in relation to the level which Pan-Atlantic establishes or maintains for its Sea-Land service.

B. The Commission is without power to require the Railroads to cancel their TOFC rates which have been shown to be compensatory and not otherwise unlawful in order to protect Pan-Atlantic's Sea-Land service from effective rail price competition.

C. The Commission, upon the record before it, and upon the findings it has made, is without power to fix any differential in favor of Pan-Atlantic's Sea-Land rates or Seatrain's rates as compared with the rail TOFC rates.

D. The Commission is without power upon the record before it to prescribe or approve differentials between the Pan-Atlantic Sea-Land rates and the rates maintained by the Railroads for their boxcar services.

E. The report and order of the Commission contains conclusions of law which are contrary to the provisions of the Interstate Commerce Act.

F. The report and order of the Commission does not meet the standards required by law in that the conclusions are not supported by adequate findings of facts.

230 G. The report and order of the Commission does not meet the standards required by law in that several of the findings of facts contained therein are without support in the record.

Wherefore, these Plaintiffs respectfully pray:

A. That as provided by 28 U.S.C. §§ 2284, 2321-2325 the Judge of this Court to whom this Complaint is presented, notify the Chief Judge of the Circuit who shall designate two other judges at least one of whom shall be a Circuit Judge to serve with said Judge as members of the Court to hear and determine this action.

B. That upon final hearing of this cause decree be entered permanently enjoining, setting aside and annulling the report and order of the Commission to the extent that it has found unlawful the TOFC rates.

C. That the Plaintiffs have such other and further relief as may be lawful and may be deemed by this Court to be fit and proper.

Respectfully submitted.

(S) THOMAS P. HACKETT,

(S) EUGENE E. HUNT,

(S) CARL HELMETAG, Jr.,

54 Meadow Street, New Haven, Connecticut,
Counsel for the Railroads.

Of Counsel:

ANDREW C. ARMSTRONG.

EDWIN N. BELL.

JAMES A. BISTLINE.

ERNEST D. GRINNELL, Jr.

CLARENCE RAYMOND.

CHARLES P. REYNOLDS.

ALBERT B. RUSS, Jr.

TOLL R. WARE.

231 *[Duly sworn to by Frank J. Orner; jurat omitted in printing.]*

232 *[Certificate of service omitted in printing.]*

233 *Appendix "A" to complaint*

LIST OF PLAINTIFFS

In addition to The New York, New Haven and Hartford Railroad Company, the following Railroads are also Plaintiffs:

Atlantic Coast Line Railroad Company

The Baltimore and Ohio Railroad Company

Chicago, Rock Island and Pacific Railroad Company

The Delaware and Hudson Railroad Corporation

Gulf, Mobile and Ohio Railroad Company

Louisville and Nashville Railroad Company

Missouri Pacific Railroad Company

The New York Central System

The Pennsylvania Railroad Company

Reading Company

Seaboard Air Line Railroad Company

Southern Railway System

St. Louis-San Francisco Railway Company
 St. Louis, San Francisco and Texas Railway Company
 Texas and New Orleans Railroad Company

234 [Appendix "B" to complaint omitted in printing.]

239 In United States District Court,
 District of Connecticut

Civil action No. 8679

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
 COMPANY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
 COMMISSION, DEFENDANTS

SEATRAN LINES, INC., INTERVENER

*Order allowing intervention of Seatrain Lines, Inc. as a
 defendant*

March 6, 1961

The Court having considered the petition of Seatrain Lines, Inc. for leave to intervene as a party defendant in the above-entitled cause, and the Court having considered the answer tendered therewith, and the Court being duly advised in the premises,

It is ordered, that Seatrain Lines, Inc. be, and it hereby is granted leave to intervene in this cause and is granted leave to forthwith file its answer herein, which answer is attached to said intervenor's motion herein.

Dated and entered in the City of New Haven, Connecticut, this days of February, 1961.

United States District Judge.

"Mar. 6, 1961

Granted R. P. Anderson, U.S.D.J."

240. In United States District Court, District of
Connecticut

Answer of intervener, Seatrain Lines, Inc.

Filed March 6, 1961

FIRST DEFENSE

[File endorsement omitted.]

[Title omitted.]

1. Admits the allegations contained in paragraphs I, II and III.

2. With respect to paragraph IV of the complaint, alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the fifth sentence thereof, and the allegation of the eleventh sentence that Pan Atlantic's containers are "easily detached"; denies the allegation of the sixth sentence that "this type of operation was standard in the coastwise" trade; denies the allegations contained in the ninth, thirteenth, fifteenth, and sixteenth sentences thereof; and otherwise admits the allegations contained in paragraph IV of the complaint.

241 3. With respect to paragraph V of the complaint, denies the allegations contained in the first, second and third sentences thereof, alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the fourth sentence thereof, and otherwise admits the allegations contained in paragraph V of the complaint, except alleges that some of the Pan Atlantic rates referred to have been cancelled.

4. With respect to paragraph VI of the complaint, alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first, second, third, ninth, tenth, and thirteenth sentences thereof; except admits that "TOFC service has many of the quality features offered by motor carriers;" denies the allegations of the fourteenth sentence and the first four words of the fifteenth sentence thereof; and otherwise admits the allegations contained in paragraph VI of the complaint.

5. Denies each and every allegation contained in paragraph VII of the complaint, except admits the TOFC rates were published on a parity with the Sea-Land rates between the same points and that the remainder of the TOFC rates between the East and Southwest were not reduced.

6. With respect to paragraph VIII of the complaint, denies the last two sentences thereof, and otherwise admits the allegations contained in paragraph VIII of the complaint.

242 7. With respect to paragraph IX of the complaint, denies the last sentence thereof and respectfully refers the Court to the reports and orders referred to for their content.

8. With respect to paragraphs X, XI and XII of the complaint, respectfully refers the Court to the opinions referred to for their content.

9. Denies each and every allegation contained in paragraph XIII of the complaint.

SECOND DEFENSE

The complaint fails to state a claim upon which relief can be granted.

Wherefore, Intervener Seatrain Lines, Inc. demands judgment against plaintiffs dismissing the complaint herein, and for its costs.

GUMBART, CORBIN, TYLER &
COOPER,

By MORRIS TYLER

205 Church Street, New Haven, Connecticut,

Attorneys for Seatrain Lines, Inc., Intervener.

Of Counsel:

CHADBOURNE, PARKE, WHITESIDE & WOLFF,

JAMES K. CRIMMINS,

ALAN S. KULLER,

25 Broadway, New York 4, N.Y.

243 [Certificate of service omitted in printing.]

244 In United States District Court, District of
Connecticut

*Order granting motion permitting additional railroads to be
included as parties plaintiff*

April 3, 1961

[File endorsement omitted.]

[Title omitted.]

On this 3rd day of April, 1961, the motion of The Atchison, Topeka & Santa Fe Railway System; Boston and Maine Railroad; The Central Railroad Company of New Jersey; Erie-Lackawanna Railroad Company; Fort Worth and Denver Railway Company; Kansas City Southern Railway Company; Missouri-Kansas-Texas Railroad Company; St. Louis Southwestern Railway Company, and The Texas and Pacific Railway Company, to be included as additional parties plaintiff is granted.

By order of

ROBERT P. ANDERSON, J.

245 In United States District Court,
District of Connecticut

*Joint answer of the United States of America and the
Interstate Commerce Commission*

Filed April 1, 1961

[File endorsement omitted.]

[Title omitted.]

Now come the United States of America and the Interstate Commerce Commission, defendants, and in answer to the Complaint:

I

Admit the allegations contained in paragraphs I through III.

II

Answering the allegations contained in paragraph IV, admit those allegations which describe in general terms the origin and

operation of Sea-Land service, but for an accurate description of the Commission's findings on these matters respectfully refer the Court to the Commission's report. For further answer to this paragraph, deny the allegations that the break-bulk service was unduly expensive to Pan-Atlantic's customers; that the Sea-Land service, from the standpoint of its transportation characteristics, is virtually the same as that offered by the interstate motor carriers, and that Pan-Atlantic is in a position to offer this Sea-Land service "to customers located throughout a vast hinterland emanating from the port cities." For lack of knowledge, neither admit nor deny the allegations contained in the sixth sentence.

III

Answering the allegations contained in paragraph V, admit that Pan-Atlantic proposed rates for this Sea-Land service which were lower than the rail rates in varying percentages as described in the Commission's report; that the railroads petitioned the Commission to suspend these rates; that in some instances the rates were suspended and in other instances they were permitted to become effective immediately; that the report of the Commission deals with these reduced rates; and that, except for those that have been cancelled, they are now in effect, since the suspension period has expired. The remaining allegations of this paragraph are argumentative or conjectural and do not call for an answer.

IV

Answering the allegations contained in paragraph VI, admit the allegations which describe in general terms the origin and operation of the trailer-on-flatcar service, but respectfully refer the Court to the Commission's report for an accurate description of the Commission's findings on these matters and for the differences in rates between TOFC and Sea-Land service. Deny the allegations that Sea-Land service is of "virtually identical quality" with the railroad TOFC service; and that the record before the Commission shows that "usually two trailers are placed on one car" in the railroad TOFC service.

V

Answering the allegations contained in paragraph VII, admit the allegations that the railroads reduced certain of their TOFC rates, but respectfully refer the Court to the report of the Commission for a description of these reduced rates. The

247 remaining allegations of this paragraph are either argumentative and do not require an answer, or involve the motives which prompted certain railroad action, or refer to alleged facts which are not within the knowledge of the defendants and therefore cannot be answered for lack of knowledge.

VI

Answering the allegations contained in paragraph VIII, admit that Pan-Atlantic petitioned to have the TOFC rates suspended; that like petitions were filed by Seatrain Lines and the motor carriers; that the rates were suspended and placed under investigation by the Commission; and that these rates have never become effective, the railroads having agreed to the continuation of the suspension pending the Commission's consideration of their lawfulness. For lack of knowledge, the defendants neither admit nor deny the allegations as to the motives which prompted the railroads to agree to the suspension and as to the amount of the traffic now being handled in TOFC service between the East and the Southwest.

VII

Answering the allegations contained in paragraph IX, admit the allegations describing in general terms the course of the administrative proceedings, but respectfully refer the Court to the Commission's report and order for a complete and accurate statement of the Commission's holding.

VIII

Answering the allegations contained in paragraph X, admit that Commissioner Hutchinson filed a separate concurring opinion, but respectfully refer the Court to the Commission's re-

port for a complete and accurate statement of the Commissioner's views.

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IX

Answering the allegations contained in paragraph XI, admit that Commissioner McPherson concurred in the Commission's report in part only, but respectfully refer the Court to the Commission's report for a complete and accurate statement of the Commissioner's views.

X

Answering the allegations contained in paragraph XII, admit that Commissioners Freas, Winchell and Webb filed a statement in which they dissented in part from the Commission's report, but respectfully refer the Court to the Commission's report for a complete and accurate statement of the views of these Commissioners.

XI

Deny the allegations contained in paragraph XIII.

XII

For further answer to the allegations of the Complaint, the defendants aver that the Commission's report and order are valid and lawful in all respects.

XIII

Except as herein expressly admitted, the defendants deny each and every allegation contained in the Complaint.

Wherefore, the United States of America and the Interstate Commerce Commission pray that the relief sought for in the

Complaint be denied, and the Complaint be dismissed, plaintiffs to pay the costs.

LEE LOEVINGER,
Assistant Attorney General,
HARRY W. HULTGREN, Jr.,
United States Attorney,

(S) JOHN H. D. WIGGER,
Attorney,
Department of Justice,
Washington 25, D.C.,
Attorneys for the United States of America.

ROBERT W. GINNANE,
General Counsel,

(S) B. FRANKLIN TAYLOR, Jr.,
Associate General Counsel, Interstate Commerce
Commission, Washington 25, D.C.,
Attorneys for the Interstate Commerce Commission.

249 [Certificate of service omitted in printing.]

250 In United States District Court of
Connecticut

Order granting motion permitting Sea-Land Service, Inc.
(formerly known as Pan-Atlantic Steamship Corporation),
to intervene as party defendant

[File endorsement omitted.]

April 17, 1961

[Title omitted.]

On this 17th day of April, 1961, the motion of Sea-Land Service, Inc. (formerly known as Pan-Atlantic Steamship Corporation) to intervene as party defendant is granted.

By order of

WM. H. TIMBERS, U.S.D.J.

"4/17/61

Granted (Having obtained Judge Hincks' approval this date)

WHT

USDJ"

251 In United States District Court, District of
Connecticut

Answer of Intervening Defendant, Sea-Land Service, Inc.

Filed April 17, 1961

[File endorsement omitted.]

[Title omitted.]

Comes now Sea-Land Service, Inc., formerly known as Pan-Atlantic Steamship Corporation, and which will be referred to hereinafter as Pan-Atlantic, and for its answer to the complaint filed in the above-entitled proceeding respectfully shows:

I

Answering Paragraphs I, II and III of the complaint, the intervening defendant admits the material allegations contained therein.

II

Answering Paragraph IV of the complaint, intervenor admits that the break-bulk type of water carrier service in which it engaged prior to 1957 was costly to operate, due to the multiple handlings of cargo, but denies that its break-bulk type operation was "unduly expensive * * * to its customers", as alleged by plaintiffs. Although the
252 containership service inaugurated by intervenor in 1957 resulted in substantial reductions in its operating costs, as found by the Commission in its report that is placed in issue by plaintiffs (Complaint, Appendix B, Page 27), the inauguration of the containership service did not reduce the transportation costs of shippers or receivers of freight via intervenor's service.

Intervenor denies the allegations of plaintiffs that service disabilities inhere in the Seatrain and railroad boxcar services vis-a-vis the Pan-Atlantic motor-and-water service.

Intervenor denies the allegation of plaintiffs that its service "from the standpoint of its transportation characteristics, is virtually the same as that offered by the interstate motor carriers." As the record before the Commission shows, the

motor-and-water service provided by intervenor is subject to the disabilities inherent in all water carrier services, these disabilities including relatively slow transit time, uncertainty due to the perils of the sea, relative infrequency of service (i.e., one sailing per week versus one or more services per day via overland carriers) and unavailability of line-haul stop-off privileges. Although, as stated by plaintiffs, service can be provided by Pan-Atlantic to shippers or consignees regardless of whether or not they are located on or near a railroad, as the record before the Commission shows and as the Commission found, 77 percent of the shippers or consignees utilizing the service of intervenor are located on railroad sidings (Complaint, App. B, Pg. 8) and it would not be feasible or practical to provide different rates for shippers who are not located on railroad sidings.

253 Intervenor denies the allegation of plaintiffs that intervenor is in a position to offer its service not only to shippers and consignees in the port cities at which it calls "but to customers located throughout a vast hinterland emanating from the port cities." Intervenor avers that although in previous years it was able to provide a service to and from inland points many miles from the ports of call, at present its operations are confined to a relatively small area outside of the port cities, due largely to the destructively competitive practices and competitive rate reductions that have been effected by the plaintiff railroads.

III

Answering Paragraph V of the complaint, intervenor avers that plaintiffs have at all times been fully aware of the aforesaid service disabilities of the Pan-Atlantic sea-land service and that in petitioning the Commission to suspend the proposed Pan-Atlantic rates plaintiffs were motivated by a desire to prevent intervenor from participating in any of the affected traffic and not by a belief that intervenor "was in fact, quality-wise, the equal of motor carrier service." Intervenor further avers that the pricing proposed by the intervenor contemplated the publication of motor-water-motor rates generally 5 and 7½ percent under all-rail rates and not "5 to 10 percent" as alleged

by plaintiffs. Intervenor avers further that freight rates via water-and-motor transportation routes have traditionally been substantially lower than rates maintained via all-rail routes, due to the disabilities of the water-and-motor routes, aforesaid. Intervenor avers further that the rates published by intervenor referred to in the complaint are higher with
 254 relation to all-rail rates than were the rates formerly maintained in intervenor's break-bulk service.

IV

Answering Paragraph VI of the complaint, intervenor admits the averment of plaintiffs that their trailer-on-flat-car services are equivalent in quality to the over-the-road motor carrier services and that the railroad TOFC rates are generally on the level of motor common carrier rates and generally higher than the rail boxcar rates. However, intervenor avers that in order to prevent the intervenor from participating in the movement of the considered traffic, the plaintiff railroads have attempted to reduce their TOFC rates substantially below their present levels and to exactly the same level as applied in connection with the inferior water and motor carrier service provided by the intervenor. Intervenor denies that its container-ship service is "of virtually identical quality" with the railroad TOFC service, and avers that intervenor's service has inherent disabilities and disadvantages to shippers, including those referred to in Paragraph II hereof. Intervenor denies that the record before the Commission shows that "Usually two trailers are placed on one car" in the railroad TOFC service.

V

Answering Paragraphs VII and VIII of the complaint, intervenor avers that irrespective of the bona fides of the plaintiff railroads when the TOFC rates at issue were published, subsequent developments, including the testimony of many shipper witnesses in the Commission proceedings, have now made it apparent that reductions in TOFC rates to the
 255 level of intervenor's rates is unnecessary to permit railroad participation in the traffic; that to the contrary, the application of such parity rates would without question

divert all of the traffic from intervenor Pan-Atlantic. The Commission found, based upon a full and complete record, that intervenor Pan-Atlantic in order to attract traffic must maintain rates differentially lower than those maintained in railroad services, especially TOFC services (Complaint, App. B, pg. 28) and ordered the plaintiff railroads not to reduce their TOFC rates to a level lower than 6 percent higher than the present Pan-Atlantic rates, although it was the contention of intervenor that it would be unable to participate in the movement of traffic in competition with rail TOFC unless its rates were at least 10 percent lower than rail TOFC rates. The averment by plaintiffs that they are not now handling TOFC traffic in competition with intervenor is without significance in view of the fact that their present TOFC rates are substantially in excess of 6 percent higher than the present Pan-Atlantic rates.

VI

Answering Paragraph IX of the complaint, intervenor submits that the report and order of the Commission referred to therein will speak for themselves. Intervenor denies the allegation that the majority opinion of the Commission fixes a differential in favor of the Pan-Atlantic rates irrespective of the level of the said Pan-Atlantic rates. To the contrary, the majority opinion specifically provides only for a rail TOFC differential above the Pan-Atlantic rates so long as the latter are not increased above their present levels.

VII

Answering Paragraphs X, XI and XII of the complaint, intervenor avers that the separate opinions of the individual commissioners referred to, as set forth in Appendix B to the complaint, will speak for themselves.

VIII

Answering Paragraph XIII of the complaint, intervenor denies the allegation in Subparagraphs A, C and D that the Commission is without power on the record before it to prescribe or otherwise establish differentials with respect to the railroad and Pan-Atlantic rates at issue. Intervenor further denies the allegation in Subparagraph B that the Commission is without power in the circumstances to require the railroads to cancel their TOFC rates at issue, even though they may have been shown to be compensatory and not otherwise unlawful, and further denies that the railroad TOFC rates at issue have in fact been shown to be compensatory and not otherwise unlawful. It denies all of the allegations in Subparagraphs E, F and G. It avers further that the allegation in Subparagraph G is vague and uncertain in that the "findings of fact" referred to therein are not identified.

IX

Further answering the complaint, intervenor avers that the Commission has ample power, as well as a statutory responsibility, under the Interstate Commerce Act, including the national transportation policy contained therein, to order the plaintiff railroads to desist from their competitively destructive freight rate practices which, unless restrained, will force

257 intervenor to discontinue its service; and that the Commission has ample power, as well as a statutory responsibility, to require the plaintiff railroads to maintain reasonable freight rates at levels that will permit participation in the competitive traffic by the intervenor as well as by plaintiffs, and at levels that will permit both to conduct economically sound operations.

X

Except as herein expressly admitted, intervening defendant denies each and all of the allegations contained in the complaint.

Wherefore, intervening defendant prays that the complaint in this action be dismissed.

[S] ALBERT W. CRETELLA,

153 Court Street,

New Haven 10, Connecticut,

[S] WILLIAM H. ARMBRECHT, Jr.,

Merchants National Bank Building,

Mobile, Alabama,

[S] WARREN PRICE, JR.,

1639 Investment Building,

Washington 5, D.C.,

Attorneys for Intervening Defendant.

258 In United States District Court, District of
Connecticut

Civil Action No. 8679

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COM-
PANY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, DEFENDANTS

SEA-LAND SERVICE, INC., AND SEATRAN LINES, INC.,
DEFENDANTS-INTERVENORS

Opinion

November 15, 1961

Before: HINCKS, Circuit Judge, and ANDERSON and TIMBERS,
District Judges

[File endorsement omitted.]

Action by plaintiffs-railroads, brought under 49 U.S.C. § 17(9); 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325; and 5 U.S.C. § 1009, to enjoin, annul and set aside an order of the

Interstate Commerce Commission, 313 I.C.C. 23, directing the cancellation of plaintiff's proposed reduced trailer-on-flat-car (TOFC) rates on various commodities.

Carl Helmetag, Jr., Philadelphia, Pa. (Thomas P. Hackett, and Eugene E. Hunt, New Haven, Conn., Andrew C. Armstrong, Edwin N. Bell, Houston, Texas, James A. Bistline, Washington, D.C., Ernest D. Grinnell, Jr., St. Louis, Mo., J. Edgar McDonald, New York City, Clarence Raymond, Louisville, Ky., Charles P. Reynolds, Norfolk, Va., Albert B. Russ, Jr., Jacksonville, Fla., and Toll R. Ware, St. Louis, Mo., of counsel), for plaintiffs.

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B. Franklin Taylor, Jr., Associate Gen. Counsel, Interstate Commerce Commission, Washington, D.C.

Richard H. Stern, Atty., Dept. of Justice, Washington, D.C. (Lee Loevinger, Asst. Atty. Gen., Dept. of Justice, Washington, D.C., Harry W. Hultgren, U.S. Atty., D. Conn., Hartford, Conn., and Robert W. Ginnane, Gen. Counsel, I.C.C., Washington, D.C., of counsel), for defendants.

Warren Price, Jr., Washington, D.C. (Albert W. Cretella, New Haven, Conn., and William H. Ambrecht, Jr., Mobile, Ala., of counsel), for defendant-intervenor Sea-Land Service, Inc.

Ralph D. Ray, New York City (Morris Tyler, Gumbart, Corbin, Tyler & Cooper, New Haven, Conn., Chadbourne, Parke, Whiteside & Wolff, Alan S. Kuller, and Charles J. Prentiss, New York City, of counsel), for defendant-intervenor Seatrain Lines, Inc.

260 HINCKS, *Circuit Judge*:

This is an action brought by several railroads to enjoin an order of the Interstate Commerce Commission, entered pursuant to a report ¹ published in 313 I.C.C. 23, directing them

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¹ References in this opinion to the report will employ the pagination of 313 I.C.C., thus: "R. 1 (2, 3, etc.)."

to cancel substantial rate reductions for 66 listed movements of their trailer-on-flat-car (TOFC) service between points in the East and Texas. Two water carriers, Sea-Land Service, Inc. (hereinafter referred to as Sea-Land), and Seatrain Lines, Inc. (hereinafter Seatrain), protested the proposed rates and appeared herein to defend the order below. The United States and the Interstate Commerce Commission also appeared herein and defended the order. They will be referred to collectively as "the government."

Sea-Land, known in the proceedings before the Commission by its former name Pan-Atlantic Steamship Corporation, in 1957 had suspended its domestic break-bulk freight service, theretofore operated between eastern ports and Southern Atlantic and Gulf ports. It substituted four "trailer-ships," each of a capacity to carry 226 standard, demountable, truck trailer-bodies, and each equipped with cranes capable of lifting the loaded trailers from their chassis on the pier, stowing them aboard, unopened, into cooperating slots and, at the ports of destination, lifting them onto trailer-chassis on the pier. By this improved highway-water-highway "fishy-back" service, Sea-Land offered a door-to-door service to all shippers and consignees accessible by highway in containers locked or unopened between the point of origin and destination. The conversion from break-bulk service to the "fishy-back" service just described enabled Sea-Land to improve the quality of its service and reduce operating costs at rates which, prior to 1957, were five to ten per cent below the rail boxcar rates.

Seatrain offers rail-water-rail service whereby loaded railroad cars are taken aboard its three steamships at Edgewater,

New Jersey and after carriage by sea to a destination

261 in a southern coast or a Gulf port are then carried by a

railroad for delivery to the consignee. Seatrain contem-

plates a modification of this service, a so-called "seamobile service," whereby the freight will be carried in special contain-

ers which may be readily transferred from highway trailers or railcars to and from its seagoing vessels. Like railroad boxcar

service, the present Seatrain service permits carriage from shipper to consignee without breaking bulk only when shipper and consignee are located on railroad sidings.

To compete with these services and especially that of Sea-Land which is available to shippers and consignees without rail access, the railroads considerably extended their "piggy-back," highway-rail-highway service, whereby trailer-bodies, without detachment from their chassis, are hauled onto and tied down upon railroad flatcars, one or two to each flatcar, and at the rail destination are hauled by tractors to the consignees' doors. Prior to 1957 the rates set for this TOFC service were generally on a parity with those in force for regulated motor-carrier service and somewhat higher than the rail boxcar rates. But to make their competition with Sea-Land's fishy-back service more successful, the railroads in 1957 filed rate schedules for their TOFC service which were substantially on a parity with Sea-Land and Seatrain rates, R. 33, and motor common carrier rates, R. 45. However, these rate schedules, since inaugurated as an experiment, were limited to 66 commodity movements from particular eastern points to Fort Worth and Dallas and return.

On petitions of Sea-Land, Seatrain, a motor-carrier association, the Secretary of Agriculture, and several municipal authorities, the Commission placed all the TOFC rates in this initial, or pilot, schedule under suspension and investigation under I. & S. Docket No. 6834—"Piggy-Back Rates—262 Between East and Texas," which also covered the lawfulness of Sea-Land rates between the same points and certain Seatrain rates. This controversy, together with three others involving the lawfulness of numerous other Sea-Land rates, each under separate docket numbers, I. & S. Docket No. M-10415, I. & S. Docket No. 6906, and I. & S. Docket No. M-11375, came on for hearing before Examiner Morgan who filed a separate report on each. On exceptions by the parties, No. M-10415 was heard by Division 3 of the Commission and on further exceptions by the railroads to the Division 3 report all four docket numbers were consolidated for hearing and dealt with in a consolidated report² by the entire Commission.

² This report embraced 43 docket proceedings.

The Commission held³ that the entire schedule of TOFC rates was unlawful and, in the order under attack herein, directed that the rates, which had theretofore been under suspension, be canceled. The cancellation date, however, was ordered suspended, thus leaving the rates in continuing suspension. It was to set aside the cancellation order as to the TOFC schedule that the railroads brought this action. Except for a few specific rates, the Sea-Land and Seatrain rates were found lawful and to this holding no exception had been taken to the Division 3 report.

The Commission's essential findings as enunciated by five of the Commissioners in its report were as follows:

1. The proposed TOFC rates would produce revenues exceeding out-of-pocket costs (see Appendix A *infra*) for all of the proposed movements by TTX flatcars⁴ and for all but six of 66 of the listed movements by railroad-owned cars,⁵ and exceeding the railroads' fully-distributed costs (see Appendix A) for 43 of the 66 movements by TTX cars and 14 movements by railroad-owned cars. R. 36. Consequently, except for the six rates returning less than *out-of-pocket* costs⁶ the TOFC rates were found to be compensatory.⁷ The corresponding Sea-Land rates, with one exception, were similarly found to be compensatory, as were the Seatrain rates.

263 2. As to the 66 movements in issue here, Sea-Land costs, both on an out-of-pocket and a fully-distributed

³ Its report was adhered to by five Commissioners. Commissioner Hutchinson concurred on the ground that the proposed schedule constituted a destructive competitive practice. Commissioner Frens, in a dissenting report in which Chairman Winchell and Commissioner Webb joined, dissented on the ground that the Interstate Commerce Act as amended neither required nor permitted "blanket protection for the water carriers." Commissioner McPherson, concurring in part, said: "I would approve all the rates which are compensatory but on this record I would not impose any differential." Only ten Commissioners were then in office.

⁴ Flatcars on lease by the railroads capable of carrying two trailers.

⁵ The conventional railroad-owned cars are generally capable of carrying only one trailer. As the Commission observed, the choice between 1- or 2-trailer cars "would rest entirely with the railroads."

⁶ These six rates the railroads withdrew and they are not in issue in this litigation.

⁷ The report makes it plain that the Commission considered that rates yielding in excess of out-of-pocket costs were "compensatory."

basis, were lower than TOFC costs except for two (out of the 66) movements accomplished by TTX cars. However, railroad boxcar costs on some of this traffic were lower than Sea-Land costs; on other portions of the traffic, Sea-Land costs were lower. On the record before it the Commission said it "can not determine * * * where the inherent advantages may lie as to any of the rates in issue." * R. 46.

3. In quality of service, the several modes rated in the following order: TOFC, all-rail boxcar, sea-land and Sea-train. However, "the most important, and usually the determinative, factor to the shippers as a whole is the measure of the rates." * R. 29.

4. All Sea-Land traffic is competitive with the railroads. But only a fraction of railroad traffic is competitive with Sea-Land. R. 45.

5. The railroads intend, if the proposed TOFC rates attracted profitable traffic, to extend the reductions in TOFC rates to many other movements than the 66 immediately involved herein. R. 47.

6. Sea-Land must recover fully-distributed costs to remain in business. R. 38.

On conclusions thought to follow from these findings, the Commission ordered the proposed TOFC rates cancelled, holding that, "the rail TOFC rates on the commodities from and to the points concerned in I. & S. No. 6834 should be maintained on a level no lower than 6 percent above * * * sea-land rates, so long as the latter are not increased above their present levels." And its order was expressly stated to be "without prejudice to the filing of new schedules *in conformity with the conclusions herein.*" R. 50. [Emphasis supplied.]

We hold that, at least on this record, the requirement of a rate differential to protect the water carriers violated

* The Commission pointed out that both the TOFC and the Sea-Land service were subject to certain variables not measurable in the record before it.

* The Commission, after describing the various competing services, concluded that "the preponderance of the testimony on these records is to the effect that most of the shippers prefer rail service to sea-land except at lower rates for the latter." This, obviously, indicates recognition of some quality-of-service superiority in dependability and speed for overland as against water transport. R. 44. See also R. 38-40.

264 the 1958 Amendment to the Interstate Commerce Act, now appearing as 49 U.S.C. § 15(a)(3), which reads as follows:

"In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

In disapproving the proposed schedule of the railroads the Commission, contrary to the specific prohibition of the 1958 amendment, is plainly holding up railroad rates "to protect the traffic" of another mode. It argues, however, that the national transportation policy (hereinafter sometimes referred to as NTP),¹⁰ to which it is commanded to give "due consideration" by the same provision, compels this result. The evidence and findings do not support this argument.

The first policy-factor mentioned in the NTP declaration is to "recognize and preserve the inherent advantages of each

¹⁰ The Congressional declaration of the National Transportation Policy was introduced into the Interstate Commerce Act by the Transportation Act of 1940, 54 Stat. 899, and now appears in the United States Code (1958) preceding §§ 1, 301, 901, and 1001 of Title 49:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages,

or unfair or destructive competitive practices; to cooperate with the
279 several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

[mode of transportation].” By “the inherent advantages” was meant the ability of a mode of transportation over the long run to provide a transportation service more acceptable to its shippers, by reason of quality or price, than that offered by a competing mode. That the calculation was to be long-run must be emphasized. The shorter-run “out-of-pocket” costs of one mode (e.g., railroads) may be lower than the longer-run “fully-distributed,” or even the shorter-run costs of competing modes (e.g., water carriers) whose long-run costs are lower. When they are, rates set by reference to out-of-pocket costs may favor what in the long run is the less efficient, higher-cost mode. Thus the “inherent advantages” of lower cost (or better service, which is discounted for price) refers to the long-run, or fully-distributed, costs of carriage.^{10a} It was

265 thought undesirable that one mode should undercut the rates of a competing lower-cost mode. Such conduct savored of a predatory competitive practice. See *Dixie Carriers v. United States*, 351 U.S. 56, 59, and n. 5 (1956). And generally it was possible to destroy a lower-cost carrier or mode only by reducing rates, at least temporarily, to a level below the costs of either. It well may be that for the higher-cost

^{10a} See *Dixie Carriers v. United States*, 351 U.S. 56, 59 (1956) (“lower cost of equipment, operation, and therefore service”; Congress’ fear was lowering of rates by “strong” carriers, putting more efficient carriers out of business, citing 84 Cong. Rec. 5874); Statements of Chairman Freas before the Senate Committee on Interstate and Foreign Commerce, Hearings on S. 3778, 85th Cong., 2d Sess. (1958) (“In many instances, however, the full cost of the low-cost form of transportation exceeds the out-of-pocket cost of another. If, then, we are required to accept the rates of the high cost carrier merely because they exceed its out-of-pocket costs, we see no way of preserving the inherent advantages of the low cost carrier.”); Colloquy between Senators Kefauver and Smathers, 104 Cong. Rec. 10859 (1958) (“Mr. Kefauver: . . . Some people have expressed the belief that under-[15(a)(3)] it would be possible for one type of carrier to lower its rate to such an extent that another carrier would not be able to compete fairly on the basis of charging the overhead to that other carrier. There is nothing in [15(a)(3)], is there, which would enable one carrier to take undue advantage of another carrier . . .?” “Mr. Smathers: No. The answer is no.”)

It will be observed that Congress had very different ideas as to what out-of-pocket and fully-distributed costs are than did the Commission. If Congress had realized that “railroad operating expenses include virtually all important railroad costs except property taxes and interest payments,” see Appendix A, *infra*, it might have acted differently. But that, of course, is not a matter for our decision.

mode to jeopardize the continued existence of a lower-cost mode by setting rates below the costs of each, could be characterized as a "destructive competitive practice" which under another NTP policy-factor was not to infect the "reasonable charges for transportation services" which the Commission was authorized to approve. But that is not this case, as we will now proceed to show.

The Commission in its report expressly admitted (R. 46) that, "we can not determine on these records where the inherent advantages may lie as to any of the rates in issue." It thus made it plain that it did not rest its holding on the "inherent advantages" factor of the NTP. Instead, it turned to another NTP factor to justify its decision. It said, at R. 44, the "TOFC rates here under investigation, with the few exceptions noted, appear to be compensatory. Many of these are above the fully-distributed costs shown, and with the exceptions mentioned, all are above out-of-pocket costs. The next, and the most important, question is whether these rates constitute destructive competition." [Emphasis supplied.] And that the Commission did, at least in part, base its decision upon a holding that the proposed TOFC rates were an "unfair or destructive competitive practice" such as it thought frowned upon by the NTP, is demonstrated by its statement that: "The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence, of the coastwise water-carrier industry generally." R. 47. Apparently the Commission thought that any rate-competition which threatens the continued existence of a competitor it had power to prevent as a "destructive competitive practice," irrespective of whether the challenged rates were compensatory to the proponent thereof or whether the mode of the contesting competitor was a lower-cost mode than that of the proponent.¹¹ This, we hold, was an erroneous interpretation of the Act, as amended.

¹¹ That the Commission considered itself vested with a power of such sweeping breadth is further demonstrated by its stated conclusion herein (R. 50) that the water carriers must be favored by a differential under railroad boxcar rates, albeit a somewhat smaller differential than the 6% differential required of TOFC rates. Yet as to boxcar costs the Commission

267 Even before 1958, it would have been erroneous to hold that irrespective of other factors rates were unlawful merely because they would destroy carriers operating under different modes of transportation. In *Schaffer Trans. Co. v. United States*, 355 U.S. 83, 91 (1957), it was said that "[t]he ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of 'inherent advantage' that the congressional policy requires the Commission to recognize."

Prior to 1958, the Commission's emphasis as between different factors of the NTP had vacillated; now allowing rate reductions to "recognize and preserve * * * inherent advantages," see *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, and later shifting its stress to "coordinating * * * a national transportation system" even at the cost of stifling competition, as in *A. W. Schaffer Extension—Granite*, 63 M.C.C. 247, rev'd sub. nom. *Schaffer Trans. Co. v. United States*, *supra*.

Against this background of vacillation, the Transportation Act of 1958 was adopted. We think that, on the whole, the amendment of Section 15(a) was intended to provide freer play for competition as between different modes while still continuing protection to the modes having the inherent advantage of low cost from unfair or destructive competitive practices. In this the Congressional history, while perhaps not conclusive, bears us out. In H.R. Rep. No. 1927, 85th Cong., 2d Sess. (1958), 2 U.S.C.C.A. 3470 (1958), it had been said: "* * * The Interstate Commerce Commission has not been consistent in the past in allowing one or another of the several modes of transportation to assert their inherent advantages in the making of rates." This House Report on § 15(a)(3) in its final form said, further: "The effect of this amendment will be to encourage competition between the different modes of transportation for the benefit of the shipping public."

268 It quoted with approval the above excerpt from the opinion in *Schaffer Trans. Co. v. United States*, *supra*.

had found only that on some of this traffic Sea-Land "is shown as the low-cost agency; on the other traffic, the railroads' costs appear to be lower." R. 46. This surely falls far short of a finding that Sea-Land's is the low-cost mode.

The report of the Senate Committee of June 3, 1958 (S. Rep. No. 1647, 85th Cong., 2d Sess.) said of § 15(a)(3) in its final form,

"The committee wishes further to emphasize that the amendment in regard to section 5 amending section 15a of the act as framed by the committee is *designed to encourage competition* in transportation by allowing each form of transportation subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to offer, with such ratemaking being regulated by the Interstate Commerce Commission, however, to prevent 'unfair or destructive competitive practices' as contemplated by the declaration of national transportation policy. Under the committee amendment *the principal emphasis*, but not the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation *will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies.*" [Emphasis supplied.]

Having in mind that by the 1938 amendment Congress for the first time articulated an express, though qualified, prohibition against holding up the rates of one mode to protect another, a prohibition accompanied by a direction that consideration shall be given to the effect of rates on the carrier for whom they are prescribed, we are unable to accept the contention in the government's brief that "section 15(a)(3) brought about no fundamental change in the law." We think that Congress in adopting the 1958 amendment, which its committees thought would encourage competition, did not intend the included prohibition of compulsory rate differentials to be nullified merely because of the adverse effect of rate competition on another mode of transportation even if carried to the point of rendering one mode of transportation obsolete and hence unable to survive. Instead, we think, the differential-

269 prohibition was intended to be qualified only when factors other than the normal incidents of fair competition intervened, such as a practice which would destroy a competing mode of transportation by setting rates so low as to be hurtful to the proponent as well as his competitor or so low as to deprive the competitor of the "inherent advantage" of being the

low-cost carrier. The "inherent advantage" factor and the "destructive competitive practice" factor were the only two policy factors mentioned in the committee reports. We think the reference to the NTP in § 15(a)(3) indicates an intent that the differential prohibition was to be qualified only when necessary because of the interplay of these two factors.

We cannot help wondering if the Commission's obvious reluctance to accept as critical the relative costs of service by the competing modes of transportation may not be attributable less to its interpretation of the applicable law than to its fear that the process which it has developed of so-called value-of-service ratemaking will be jeopardized if it be required to make critical findings as to the comparative costs of competing modes of transportation.

Value-of-service ratemaking is a price-discrimination device, used either to maximize profit or to subsidize certain interests. As a maximizing tool, it can be used by a monopolist in the following way. M has a product—transportation—with two potential buyers, A and B. A uses it to ship industrial sand which he sells for \$10 a ton, B to ship coal which he sells for \$35 a ton; M's cost of shipment is the same for both. If he sets a uniform rate per ton of \$2, B will ship but A will not—he will not be able to meet his competition at the market. If M sets his price at a uniform \$1 per ton, both will ship—but M will lose a greater revenue which he could have garnered from

B. And if M's out-of-pocket cost of carriage is \$0.75 per ton, he will want A's \$1 traffic. Early railroads thus developed the practice of charging \$2 to B and \$1 to A, cost of carriage notwithstanding.

This value-of-service pricing is not necessarily unsound economically. Economists generally agree that:

"Preferential rates relieve rather than burden other traffic if two conditions are fulfilled. These are (1) that the rate must more than cover the direct costs; and (2) that the traffic will not move at higher rates."¹²

And the I.C.C., partly because this was the rate pattern prevailing when the Commission was established, and partly to

¹² Locklin, *Economics of Transportation* 158 (1954).

maximize utilization of the railroads, adopted value-of-service as its own criterion of ratemaking.

The Commission, however, added factors of discrimination other than profit maximization. One of these is subsidization of certain commodities producers, perhaps under political pressures. Thus corn is carried at 85 per cent of out-of-pocket costs; beets at 57 per cent; gravel and sand at 88 per cent; logs at 62 per cent. And of course, passenger traffic has been carried at a loss for some time. These losses are made up on other traffic, such as gasoline, 135 per cent; equipment parts, 236 per cent; and metal alloys, 264 per cent.¹³ Other discriminations sometimes introduced by the I.C.C. are attributable to its desire to act as an economic planner, see, e.g., *Anchor Coal Co. v. United States*, 25 F. 2d 462, 470 (1928).

These official discriminations, hallowed and encrusted by time and inertia, now pervade the rate structure; indeed they are the rate structure. The rates on high-value commodities are thus twice subject to arbitrary boosting. First, they bear as part of their "cost" the subsidies extended to traffic which does not pay the out-of-pocket cost of its carriage. And second, high-value commodities are expected to yield for the carriers a profit above their fully-distributed costs sufficient to compensate for any deficiency in the fully-distributed costs of other traffic.

271 This disquisition may help to an understanding of what the I.C.C. attempted and did in this controversy. It serves to point out that "cost" as used by the I.C.C. is a term of art. "Fully-distributed costs" of operation are actually the I.C.C.'s estimate of returns necessary to continued profitable operation. "Fully-distributed cost" of a given service is a largely arbitrary estimate of the proportion of system "costs" which the I.C.C. feels a given service should contribute to total revenue. For example, under the Commission's scheme of ratemaking the "fully-distributed cost" of the TOFC freight service is set at a level high enough to absorb, in addition to

¹³ These figures are from ICC, Bureau of Accounts & Cost Findings, *Distribution of Rail Revenue Contribution by Commodity Groups—1952*, Table 12 (1955).

direct freight expenditures, the TOFC "share" of the eastern railroads' passenger-operations deficit. See Appendix A.

Thus the Commission was inhibited, by the terms of its own analysis, from a meaningful comparison of TOFC's cost to Sea-Land's cost. The "costs" of TOFC for these 66 movements were the sum of the following components: direct TOFC costs, a judgment of the appropriate shares of subsidy owed by TOFC to other railroad traffic, and an estimate of what contribution to total railroad revenue the high-value commodities here involved should make. Except for the application of value-of-service criteria Sea-Land "costs" were not complicated by these extrinsic factors. In short, under the Commission's scheme, TOFC costs and Sea-Land costs were incommensurate quantities.

But this lack of real significance in its cost comparisons is almost academic when set against the Commission's method of decision. That process, as nearly as we can trace it, was as follows. First, Sea-Land's overall revenue needs were calculated by the process outlined in Appendix A. Value-of-service criteria were then applied to determine the share of its needs to be met by the commodities in question. From 272 this figure was derived the "fully-distributed cost" of Sea-Land's carriage of these items. The railroads, in effect, were then ordered to leave the traffic with Sea-Land by maintaining their rates at a 6 per cent differential. This conclusion was bolstered by a recital of TOFC "costs" computed as we have seen on an essentially different basis. The effect was to obscure, rather than illuminate, the identification of the "low-cost" mode.

If, instead of cancellation, the disposition of the proposed rates had been one of approval, and forced Sea-Land to reduce its own rates on the commodities involved, it is true that the substantial extra margin of profit the Sea-Land rates provide for the company as a whole, which is available to augment the lower profits from the revenues of low-value movements, would have been reduced. This, we think, is what the Commission meant when it said: "The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the con-

tinued operation, and thus the continued existence, of the coastwise water-carrier industry generally." R. 47. Apparently, the Commission thought that any competition having such effect on water carriers, i.e., to reduce rates on high-value commodities, was necessarily "an unfair or destructive competitive practice" within the meaning of the statutory declaration of the NTP.

Such an interpretation of the Commission's decision might avoid some of the difficulties we find with that order; for example, it would explain why the Commission refused to allow TOFC rates to be lowered to a level still above the railroad's fully-distributed costs. But if the Commission decision does represent such an attempt to preserve its value-of-service ratemaking structure, the decision must fall for lack of evidence and necessary findings. For the Commission would
 273 have been warranted in holding up the TOFC rates for these 66 movements to protect an *integral overall rate structure* for Sea-Land only on evidence and findings that, notwithstanding the § 15(a)(3) prohibition of differentials, the *integral overall rate structure* was required by one or more of the policy-factors enumerated in the NTP, and particularly the policy to protect the "inherent advantages" of the overall structure against "destructive competitive practices" and "the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service." Sec. 15(a)(2).

There was no finding here that the *overall rate structure* of Sea-Land which the Commission sought to preserve was that of the *overall low-cost mode*. This finding the Commission refused to make; indeed it could not, for as it said, "we do not have before us the rail costs as to many of these rates * * * we can not determine on these records where the inherent advantages may lie as to any of the rates in issue." True, it found that as to many of the 66 movements in question, Sea-Land was a lower-cost mode than TOFC; but it did not find that Sea-Land service was in general a lower-cost mode than railroad service in general. All-rail boxcar service, as well as TOFC, competes with Sea-Land, and as to many boxcar rates the Commission's finding was, "the railroads' costs appear to

be lower." R. 46. Yet the Commission concluded that Sea-Land was entitled to protection against boxcar competition, as well as TOFC competition, though by a differential "somewhat lower" than the 6% prescribed for TOFC. R. 50. See also I.C.C. I. & S. Docket No. 7454 (May 18, 1961). We conclude that, for lack of evidence and findings that Sea-Land was in general the low-cost mode, the action of the Commission, in so far as it sought to protect Sea-Land's overall rate structure, was an unlawful interference with the forces of competition fostered—not proscribed—by § 15(a)(3).

274 For its disregard of the differential-prohibition the

Commission also places reliance on the "national defense" clause of the NTP. In this too, we think the Commission misinterpreted the law. True, the hoped-for "end" of the National Transportation Policy is a system "adequate to meet the needs * * * of the national defense." But the national defense is not stated as an operative policy or means: it is mentioned only as the hoped-for "end" of the operative policy-factors previously enumerated. It is not stated, and we think not intended, as a blanket grant of power to the Commission effective to nullify the express prohibition of rate differentials. By its emphasis on the supposed needs of national defense the Commission overrides the express prohibition of rate differentials without invoking, and without basis for invoking, the two policy-factors of the NTP discussed above, which may properly qualify that prohibition. Its stress on national defense also brings it into conflict with all three policy-factors enumerated in § 15(a)(2), viz, the effect of the TOFC proposed rates on the TOFC carriers, the public need of railroad service at the lowest compensatory rate, and the carriers' need for compensatory revenues. These three factors are as much a part of the national policy as the several policy-factors in the NTP declaration. Even if these factors were deemed to conflict with each other, we think it not proper to disregard the more recent expressions of Congressional intent contained in paragraph (3) of § 15(a).

Moreover, we find scant basis of fact supporting the Commission's action even if its interpretation of the applicability of the "national defense" clause were correct. The pertinent

evidence seems to be confined to: (1) a 1955 report of the U.S. Maritime Administration entitled "Review of the Coastwise and Intercoastal Shipping Trades." This report stresses
 275 the need for break-bulk capacity. Neither Seatrain nor Sea-Land now have such capacity. (2) S. Rep. 2494, 81st Cong., 2d Sess. (1950), which refers in passing to the importance of coastal shipping to the national defense. But the Senate Report is eleven years old, and does not seem to have resulted in legislation. Whatever its relevance in 1950, it must yield to the specifics of the 1958 Act. After all, so far as appears, compulsory rate differentials were not set up to protect the coastwise carriers at the expense of competing modes and the shipping public, from their tremendous loss of tonnage between 1940 and 1958. R. 27.

The Commission says that "shipper evidence * * * is indicative of a need by the general public for the services of these lines." R. 49. This statement assumes the matter for decision: since cost is a major factor, as long as the Commission maintains a rate differential shippers will "need" the lower-rate mode. Should the Commission heed the statute and allow the reductions, the "need" in evidence may well disappear.

The defendants' other arguments can be disposed of shortly.

The Commission indicates, and the government insists, that a full-fledged rate war is the inevitable consequence of allowing the proposed rate reduction. But surely, under its power to fix minimum rates, 49 U.S.C. § 15(1), the Commission will have power to disapprove rates not compensatory. Nothing in this opinion disparages that power.

Seatrain in its brief expresses fear that the proposed rates, if effective, would eliminate it as a competitor and suggests that the railroads might use its demise as an opportunity for rate increases. That bogie is laid at rest by 49 U.S.C. § 4(2). In other respects, the Seatrain position is largely that of Sea-Land and the government except that Seatrain produced no evidence from which its costs could be found. R. 38.

276 The government further argues that the proposed rates were disallowed not because a differential was needed to protect the water carriers but because the railroads failed to sustain the burden of proof. Thus it says in its brief:

"when the proponents of a lowered rate which will deprive another mode of needed traffic, indeed deprive it of any opportunity to compete, fails to establish that the proposed rates are not cost-justified in that they reflect inherent cost advantages, then the rate should, not, and certainly need not, be allowed." Beyond doubt, in the situation here, the burden was upon the railroads, as proponents, to submit evidence from which their own costs for the 66 movements could be determined. Indeed, the Act, 49 U.S.C. § 15(7), provides that "the burden of proof shall be on the carrier [who seeks a rate-change] to show that the proposed changed rate * * * is just and reasonable." But where, as here, a rate-change is protested because of its effect upon a competing mode by one who claims to have the inherent advantage of lower costs, it is for the protestant to show its costs. This was expressly recognized in the dissenting report herein and not disputed in the majority report. And in the report of the Commission in No. 32920 on "Various Commodities from or to Arkansas and Texas," decided June 22, 1961, this rule was expressly recognized.

Finally, the government urges that even if the Commission's order was improperly based on a belief that the water carrier traffic, notwithstanding § 15(a)(3), should be protected, it would be futile and fruitless for us to set aside the order because the same order would then be made upon another ground, viz., that the water carriers were in fact the low-cost mode. As we have shown, no adequate basis for such a ground of decision is disclosed in the present record. But even if in this we are wrong, we cannot say what disposition the Commission would

make of the controversy if authoritatively advised that
 277 the rationale of the report now before us is erroneous.

In that event, it would be for the Commission, not this court, to decide whether the record should be reopened for further evidence and to evaluate the evidence. *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80 at pp. 87, 88.

Accordingly, the order requiring cancellation of the TOFC rates is set aside, and the Commission is enjoined from cancellation of TOFC rates which return at least the fully-distributed cost of carriage.

If, however, on some enlarged record the Commission shall find that the water carriers are, in general the low-cost mode, and if it shall also find that value-of-service considerations demand water carrier rates on particular movements and commodities which each return to the water carriers more than their fully-distributed costs, our injunction will not go so far as to prevent the Commission from requiring that TOFC rates be set high enough to protect water carrier traffic; provided, however, a railroad rate for a particular movement, if it yields the railroad's fully-distributed cost which is lower than the water carrier's fully-distributed cost, may not be disturbed. It is noted that at least two of the rates involved in this proceeding were found to fall in this two-pronged category. See R. 35.

A decree in accordance with this opinion may be submitted by the plaintiffs, on notice unless consultation amongst the parties shall bring about a waiver of notice.

CARROLL C. HINCKS,
U.S. Circuit Judge.

ROBERT P. ANDERSON,
U.S. District Judge.

WM. H. TIMBERS,
U.S. District Judge.

NOVEMBER 15, 1961.

The I.C.C. report speaks freely of "out-of-pocket" costs and of "fully-distributed" costs but gives no definition to the sense in which it uses these terms. Since an understanding of the I.C.C.'s cost techniques is necessary to an understanding of its decision, we state in this appendix our understanding of the I.C.C. cost technique as gleaned from the sources indicated.

The I.C.C. employs different techniques for estimating railroad and water-carrier costs, reflecting the differing characteristics of each mode.

Water-carrier costs are calculated by traditional accounting methods, since they are "largely associated with the individual accounting unit," Meyer, Peck, Stenason & Zwick, *Competition in the Transportation Industries*, 112 (1959)—i.e., the operations of a given ship or ships. The costs for component items—including steamships, trucks, stevedoring charges, port charges, interest and depreciation, the motor service charges at each end of the voyage, and overhead—are calculated for representative voyages. Costs per ton-mile are computed by applying average figures for tonnage and mileage.

Costs are then broken down into two categories, (1) "out-of-pocket" and (2) "fully-distributed." "Out-of-pocket" costs represent a rough approximation of the long-run marginal (i.e., added) costs of carriage. Estimates are made of the degree to which each of the cost components mentioned above—steamships, trucks, stevedoring, etc.—varies with the volume of traffic carried. To arrive at a ton-mile figure, non-varying expenditures (those attributable to size of plant rather than intensity of use) such as billing, terminal supervision, garages, etc., are subtracted from total expenditures, and the remainder divided by ton-miles carried. See Rationale of Cost Finding Section, Hearing Examiner's Proposed Report, I. & S. Docket No. M-10415, Appendix B.

"Fully-distributed" costs, by contrast, represent an approximation of the total long-run costs of remaining in operation. To obtain fully-distributed cost, corporate overhead is first added to "full" operation cost, i.e., to all direct expenditures. Then, on the basis of a 95% "operating ratio," i.e., the ratio between direct expenditures plus overhead, and fully-distributed costs, an allowance for profit is calculated which amounts to about 5.3% (.0526+) of direct expenditures plus overhead. The fully-distributed cost is the sum of this profit, the overhead, and direct expenditures. This method is used by the I.C.C. whenever capital investment is low, so that a return figure based on such investment would not reflect the size of operations. Sea-Land pressed this form of calculation because its vessels are largely chartered and its motor service hired. In this, the I.C.C. acquiesced. See Rationale of Cost Finding Section, K & S. Docket No. M-10415, *supra*.

Railroad cost figures cannot be developed so easily. The basic difficulty is in "multiple use"—the tracks, rolling stock, terminal expenses, and even the trains themselves, carry mixed shipments to different destinations. Apportionment of costs to the different services offered is a complex and difficult process. For example, assume a train already made up and ready to go. What is the marginal or added cost of tacking on two more flatcars? Or should these two cars bear some proportion of costs incurred before they were added, which indeed would have been fully incurred even if the cars had not been added?

281 For accounting purposes, the cars are regarded as bearing a proportionate share of total cost—in other words, the marginal cost of added shipments is in reality average cost of all shipments. Commonly, costs per unit of output—or variable costs—are calculated by a formula of the type $Y = a + bX$, where Y is the ratio of total operating expenses to miles of track; a is "threshold" cost of operation: non-fixed investment which nevertheless must be made in some minimum quantity when *any* amount of activity is undertaken (such as the pay of one secretary—you can't hire one half a secretary); b is cost per unit of output; and X is the ratio of gross ton-miles of traffic to total miles of track. From the above formula, the I.C.C. derives what it calls a "percent

variable." This is an expression of the proportion of variable costs to total costs— $\frac{bX}{Y}$. Meyer, et al., *supra*, at 274.

To estimate the costs of a particular service, the following procedure is used. Some costs, such as right-of-way maintenance, are developed for the system as a whole, on a gross ton-mile basis, and this average then applied to the movements in question. Other costs, capable of direct observation—e.g., use of switch engines, special equipment—are then added, after application of the "percent variable" derived earlier. The result is the "out-of-pocket" cost of service. See, e.g., *Rational* of Cost Finding Section, at R. 54 and following.

For our purposes, it is important to realize what kinds of railroad expenses are attributed to a service by the I.C.C. in calculating "out-of-pocket" costs. (These expenses are included by attribution whenever they are not susceptible of direct observation.) Total operating expense "includes all the labor, fuel, and miscellaneous variable costs associated with the operation of trains, yards, and stations; it also encompasses marketing, advertising, selling and promotion expenses under the catch-all heading of traffic expenses; even supervisory and legal expenses are included; furthermore, the major portion of capital consumption costs is found in the maintenance-of-way and structure and in maintenance-of-equipment accounts. In short, railroad operating expenses include virtually all important railroad costs except property taxes and interest payments." Meyer, et al., *supra*, at 275. Furthermore, shares of these tax and interest payments, as well as a return figure, are then assigned to the particular traffic under investigation in order to calculate "out-of-pocket" costs. See R. 55.

"Fully-distributed" costs include, in addition to "out-of-pocket" costs: the non-varying portion of operating expenses (b in the formula); the remainder of taxes and interest; the remainder of capital costs; and a 4% return on investment. "Fully-distributed" costs of a particular service are then obtained by adding an aliquot share of the system's fully-distributed cost components to the calculated "out-of-pocket" cost of the service. Cf. R. 55-56.

282 In United States District Court, District of
Connecticut

Civil action No. 8679

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, DEFENDANTS

SEA-LAND SERVICE, INC., AND SEATRAN LINES, INC.
DEFENDANTS-INTERVENORS

Judgment

January 8, 1962

[File endorsement omitted.]

This cause having been heard on the plaintiffs' complaint seeking to enjoin, set aside, and annul a report and order of the Interstate Commerce Commission dated December 19, 1960 and the order dated February 3, 1961 in a proceeding styled Commodities—Pan-Atlantic Steamship Corporation, Investigation and Suspension Docket No. M-10415, which embraces a proceeding styled Piggy-back Rates—Between East and Texas, Investigation and Suspension Docket No. 6834, to the extent that such reports and orders found unlawful and unreasonable certain Trailer-on-Flatcar (TOFC) rates described more fully therein and included in Investigation and Suspension Docket No. 6834; and the parties appearing by counsel having been heard and the issues duly tried; and the Court having concluded in its opinion that plaintiffs are entitled to judgment:

It is hereby Ordered, Adjudged and Decreed that the above described reports and orders of the Interstate Commerce Commission entered December 19, 1960 and February 3, 283 1961, to the extent that they found unlawful and unreasonable certain Trailer-on-Flatcar (TOFC) rates described more fully therein, be set aside and vacated in accordance with the opinion of this Court and that the Inter-

state Commerce Commission is hereby enjoined from enforcing them without prejudice to such further proceedings as the Commission may deem appropriate.

Issued at New Haven, Connecticut, this 8th day of January, 1962.

CARROLL C. HINCKS,
United States District Judge.
ROBERT P. ANDERSON,
United States District Judge.
WILLIAM H. TIMBERS,
United States District Judge.

284 In United States District Court, District of
Connecticut

*Notice of appeal by I.C.C. to the Supreme Court of the United
States*

Filed March 9, 1962

I

[File endorsement omitted.]

[Title omitted.]

Notice is hereby given that the Interstate Commerce Commission, a defendant in the above-entitled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on January 8, 1962.

This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101(b).

II

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in such transcript the following:

- (1) Complaint filed February 2, 1961, with its Appendices A and B.

285 (2) Order of Court entered on or about March 6, 1961, allowing intervention of Seatrain Lines, Inc., as a defendant.

(3) Answer of Intervenor, Seatrain Lines, Inc., apparently filed on or about March 6, 1961.

(4) Order of Court, dated April 3, 1961, permitting additional railroads to be included as parties plaintiff.

(5) Joint Answer of the United States of America and the Interstate Commerce Commission, filed on or about April 3, 1961.

(6) Order of Court, dated April 17, 1961, allowing intervention of Sea-Land Service, Inc., as a defendant.

(7) Answer of Intervenor, Sea-Land Service, Inc., filed in April 1961.

(8) Opinion of the Court filed November 15, 1961.

(9) Judgment of the Court filed January 8, 1962.

(10) The certified copy of the record before the Interstate Commerce Commission in its Investigation and Suspension Dockets Nos. M-10415, 6834, M-11375, 6906, and embraced proceedings, admitted into evidence at the hearing before the Court on June 20, 1961, and accompanying certificates of the Secretary of the Interstate Commerce Commission, dated April 20, 1961, specifying the contents of the record certified.

(11) This Notice of Appeal.

III

The following questions are presented by this appeal:

1. Whether, under Section 15a(3) of the Interstate Commerce Act and the National Transportation Policy, the Commission may find not shown to be just and reasonable, and require cancellation of, certain reduced railroad trailer-on-flatcar rates, which are compensatory (i.e., exceed the
286 railroads' out-of-pocket costs in all instances and their fully-distributed costs in many instances) but represent substantial reductions from levels maintained elsewhere to the same levels of the rates of the coastal water carriers and are applicable only to points served by the coastal water carriers, where the water carriers' service cannot compete at equal rates with the railroads' service and where the reduced rail rates are part of a program of rail rate reductions which threatens the continued existence of the coastal water carriers?

2. Whether, under the foregoing circumstances, the Commission may find such rail rates to be unlawful without finding as a controlling consideration that the competing water carriers are the low cost mode of transportation?

3. Whether, if the Commission must make such a finding, it must do so in terms of the "integral overall rate structure" of the competing modes of transportation?

4. Whether, if the Commission must make such a finding, it is precluded from rejecting any rail rate for a particular movement which yields the railroad's fully-distributed cost which is lower than the fully-distributed cost of the competing water carrier?

(S) ROBERT W. GINNANE,
General Counsel,

(S) B. FRANKLIN TAYLOR, Jr.,
Associate General Counsel, Interstate Commerce
Commission, Washington 25, D.C.
Attorneys for the Interstate Commerce Commission.

287 [Proof of service omitted in printing.]

289 In United States District Court, District of
Connecticut

*Notice of appeal by Sea-Land Service, Inc., to the Supreme
Court of the United States*

Filed March 9, 1962

[File endorsement omitted.]

[Title omitted.]

I

Notice is hereby given that Sea-Land Service, Inc. an intervening defendant in the above-entitled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on January 8, 1962.

This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101(b).

II

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in such transcript the following:

290 (1) Complaint filed February 2, 1961, with its Appendices A and B.

(2) Order of Court entered on or about March 6, 1961, allowing intervention of Seatrain Lines, Inc., as a defendant.

(3) Answer of Intervenor, Seatrain Lines, Inc., apparently filed on or about March 6, 1961.

(4) Order of Court, dated April 3, 1961, permitting additional railroads to be included as parties plaintiff.

(5) Joint Answer of the United States of America and the Interstate Commerce Commission, filed on or about April 3, 1961.

(6) Order of Court, dated April 17, 1961, allowing intervention of Sea-Land Service, Inc., as a defendant.

(7) Answer of Intervenor, Sea-Land Service, Inc., filed in April 1961.

(8) Opinion of the Court filed November 15, 1961.

(9) Judgment of the Court filed January 8, 1962.

(10) The certified copy of the record before the Interstate Commerce Commission in its Investigation and Suspension Dockets Nos. M-10415, 6834, M-11375, 6906, and embraced proceedings, admitted into evidence at the hearing before the Court on June 20, 1961, and accompanying certificates of the Secretary of the Interstate Commerce Commission, dated April 20, 1961, specifying the contents of the record certified.

(11) This Notice of Appeal.

III

The following questions are presented by this appeal:

1. Whether, under Section 15a(3) of the Interstate Commerce Act and the National Transportation Policy, the Commission may find not shown to be just and reasonable,
291 and require cancellation of, certain reduced railroad trailer-on-flatcar rates, which are compensatory (i.e.,

exceed the railroads' out-of-pocket costs in all instances and their fully-distributed costs in many instances) but represent substantial reductions from levels maintained elsewhere, to the same levels of the rates of the coastal water carriers and are applicable only to points served by the coastal water carriers, where the water carriers' service cannot compete at equal rates with the railroads' service and where the reduced rail rates are part of a program of rail rate reductions which threatens the continued existence of the coastal water carriers?

2. Whether, under the foregoing circumstances, the Commission may find such rail rates to be unlawful without finding as a controlling consideration that the competing water carriers are the low cost mode of transportation?

3. Whether, if the Commission must make such a finding, it must do so in terms of the "integral overall rate structure" of the competing modes of transportation?

4. Whether, if the Commission must make such a finding, it is precluded from rejecting any rail rate for a particular movement which yields the railroad's fully-distributed cost which is lower than the fully-distributed cost of the competing water carrier?

(S) WARREN PRICE, Jr.,

1000 Vermont Avenue, N.W., Washington 5, D.C.

Attorney for Sea-Land Service, Inc.

ALBERT W. CRETELLA,

153 Court Street, New Haven, Conn.,

Attorney for Sea-Land Service, Inc.

292 [Proof of service omitted in printing.]

294 In United States District Court, District of
Connecticut

*Notice of appeal by United States to the Supreme Court of
the United States*

Filed March 9, 1962

[File endorsement omitted.]

[Title omitted.]

I

Notice is hereby given that the United States of America, a defendant in the above-entitled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on January 8, 1962.

This appeal is taken pursuant to 28 U.S.S. §§ 1253 and 2101(b).

II

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in such transcript the following:

(1) Complaint filed February 2, 1961, with its Appendices A and B.

(2) Order of Court entered on or about March 6, 1961, allowing intervention of Seatrain Lines, Inc., as a defendant.

(3) Answer of Intervenor, Seatrain Lines, Inc., apparently filed on or about March 6, 1961.

295 (4) Order of Court, dated April 3, 1961, permitting additional railroads to be included as parties plaintiff.

(5) Joint Answer of the United States of America and the Interstate Commerce Commission, filed on or about April 3, 1961.

(6) Order of Court, dated April 17, 1961, allowing intervention of Sea-Land Service, Inc., as a defendant.

(7) Answer of Intervenor, Sea-Land Service, Inc., filed in April 1961.

(8) Opinion of the Court filed November 15, 1961.

(9) Judgment of the Court filed January 8, 1962.

• (10) The certified copy of the record before the Interstate Commerce Commission in its Investigation and Suspension Dockets Nos. M-10415, 6834, M-11375, 6906, and embraced proceedings, admitted into evidence at the hearing before the Court on June 20, 1961, and accompanying certificates of the Secretary of the Interstate Commerce Commission, dated April 20, 1961, specifying the contents of the record certified.

(11) This Notice of Appeal.

III

The following questions are presented by this appeal:

1. Whether, under Section 15a(3) of the Interstate Commerce Act and the National Transportation Policy, the Commission may find not shown to be just and reasonable, and require cancellation of, certain reduced railroad trailer-on-flat-car rates, which are compensatory (i.e., exceed the railroads' out-of-pocket costs in all instances and their fully-distributed costs in many instances) but represent substantial reductions from levels maintained elsewhere to the same levels of the rates of the coastal water carriers and are applicable only to points served by the coastal water carriers, where the water carriers' service cannot compete at equal rates with the railroads' service and where the reduced rail rates are part of a program of rail rate reductions which threatens the continued existence of the coastal water carriers.

296 2. Whether, under the foregoing circumstances, the Commission may find such rail rates to be unlawful without finding as a controlling consideration that the competing water carriers are the low cost mode of transportation.

3. Whether, if the Commission must make such a finding, it must do so in terms of the "integral overall rate structure" of the competing modes of transportation.

4. Whether, if the Commission must make such a finding, it is precluded from rejecting any rail rate for a particular movement which yields the railroad's fully-distributed cost which is lower than the fully-distributed cost of the competing water carrier for such movement.

(S) RICHARD A. SOLOMON,

(S) RICHARD H. STERN,

Attorneys, Department of Justice.

(S) ROBERT C. ZAMPANO,

United States Attorney.

297 [Proof of service omitted in printing.]

298 In United States District Court, District of
Connecticut

*Notice of appeal to the Supreme Court of the United States by
Seatrain Lines, Inc.*

Filed March 9, 1962

[File endorsement omitted.]

[Title omitted.]

I

Notice is hereby given that Seatrain Lines, Inc., defendant-intervenor, hereby appeals to the Supreme Court of the United States from the final order, decree and judgment, entered in this action on January 8, 1962.

This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101(b).

II

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include the following:

- 299 1. Complaint filed February 2, 1961, with its Appendices A and B.
2. Answer of defendant-intervenor, Seatrain Lines, Inc., filed on February 28, 1961.
3. Order of Court entered on March 7, 1961, allowing intervention of Seatrain Lines, Inc., as a defendant.
4. Order of Court, dated April 3, 1961, permitting additional railroads to be included as parties plaintiff.
5. Joint Answer of the United States of America and the Interstate Commerce Commission, filed on or about April 3, 1961.
6. Order of Court, dated April 17, 1961, allowing intervention of Sea-Land Service, Inc., as a defendant.
7. Answer of defendant-intervenor, Sea-Land Service, Inc., filed in April 1961.
8. Opinion of the Court filed November 15, 1961.
9. Judgment of the Court filed January 8, 1962.
10. The certified copy of the record before the Interstate Commerce Commission in its Investigation and Suspension

Dockets Nos. M-10415, 6834, M-11375, 6906, and embraced proceedings, admitted into evidence at the hearing before the Court on June 20, 1961, and accompanying certificates of the Secretary of the Interstate Commerce Commission, dated April 20, 1961, specifying the contents of the record certified.

11. This Notice of Appeal.

300

III

The following questions are presented by this appeal:

1. Whether in determining the reasonableness of drastically reduced rail rates, which are limited to points served by water carriers and which are designed to divert traffic from regulated common carriers by water, the Interstate Commerce Commission is required to place exclusive reliance on the costs of the competitive rail and water services?

2. Whether Section 15a(3) of the Interstate Commerce Act, as added to that Act in 1958, made a major modification in the National Transportation Policy, so as to make costs of providing service the principal, if not the exclusive, criterion, by which the lawfulness of competitive rate reductions must be determined?

3. Whether the Interstate Commerce Commission's findings that certain reduced railroad trailer-on-flat-car rates would preclude the coast-wise water carriers from competing at equal rates with the railroad's service, would result in a vicious cycle of rate cutting and would threaten the continued existence of the coast-wise water carrier industry generally and its further findings that coast-wise shipping is important for national defense purposes and is an important and essential part of a national transportation system adequate to meet the needs of the commerce of the United States justify the conclusion of the Commission that the plaintiff railroads failed to sustain their statutory burden of proof "that the proposed

301 changed rate * * * is just and reasonable" under Section 15(7) of the Interstate Commerce Act?

GUMBART, CORBIN, TYLER &
COOPER,

(S) MORRIS TYLER,
205 Church Street, New Haven, Connecticut,

(S) RALPH D. RAY,
25 Broadway, New York 4, New York,
Attorneys for Seatrains Lines, Inc.

302 [Proof of service omitted in printing.]

303 Supreme Court of the United States

Nos. 108, 109, 110, and 125, October Term, 1962

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, ET AL.

SEA-LAND SERVICE, INC., APPELLANT

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, ET AL.

SEATRAN LINES, INC., APPELLANT

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
ET AL.; AND

UNITED STATES, APPELLANT

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

Order noting probable jurisdiction

October 8, 1962

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allowed for oral argument.

Mr. Justice Goldberg took no part in the consideration or decision of these cases.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. _____

INTERSTATE COMMERCE COMMISSION, APPELLANT.

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court is reported at 199 F. Supp. 635 and is set forth as Appendix A to this Statement. The report of the Interstate Commerce Commission is printed at 313 I.C.C. 23 and is reproduced as Appendix C to this Statement.

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398, 2284 and 2321-2325 to set aside an order of the Interstate Commerce Commission. The judgment of the three-judge district court (Appendix B, *infra*) was entered on January 8, 1962, and the Interstate Com-

merce Commission filed its notice of appeal in the district court on March 9, 1962.

The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by *United States v. Drum*, 368 U.S. 370.

STATUTES INVOLVED

The National Transportation Policy (49 U.S.C. preceding sections 1, 301, 901 and 1001) and sections 15(7), 15a, 305(c) and 307(d) (49 U.S.C. 15(7), 15a, 905(c) and 907(d), respectively) are set forth in Appendix D.

QUESTIONS PRESENTED

The railroads proposed reduced trailer-on-flatcar (TOFC) rates which are compensatory (i.e., exceed the railroads' out-of-pocket costs in all instances and their fully-distributed costs in many instances), but represent substantial reductions from levels maintained elsewhere to the same levels as the rates of the coastwise water carriers and are applicable only to points served by the coastwise water carriers. The following questions are presented:

1. Whether, under sections 15(7) and 15a(3) of the Interstate Commerce Act and the National Transportation Policy, the Commission may reject as not shown to be just and reasonable the proposed railroad TOFC rates without finding, as the controlling consideration, that the competing coastwise water carriers are the low cost mode of transportation, where the Commission found that the coastwise water carriers' service cannot compete at equal rates with the

railroads' service, that the reduced rail rates are part of a program of rail rate reductions which threaten the continued existence of the coastwise water carrier industry, and that coastwise shipping is important for national defense purposes and is needed by the public as an integral part of the national transportation system.

2. Whether, if the Commission must find as the controlling consideration that the coastwise water carriers are the low cost mode, it must find that the water carriers are the "overall low-cost mode", rather than the low-cost mode with respect to the particular movements involved.

3. Whether, if the Commission must make such finding, it is in any event precluded from rejecting a rail rate for a particular movement which yields the railroads' fully-distributed cost which is lower than the fully-distributed cost of the competing water carrier for such movement.

STATEMENT

This case involves the validity of so much of an order of the Interstate Commerce Commission as directed the cancellation of some 66 substantially reduced commodity rates proposed by several railroads for their TOFC or "piggyback" service between points in the East, on the one hand, and Dallas and Ft. Worth, Texas, on the other. The railroads' proposed rates were limited to points served by the only deep-water common carriers now engaged in the Atlantic-Gulf coastwise trade, namely, Sea-Land Service, Inc. (referred to in the Commission's report by its former

name of Pan-Atlantic Steamship Corporation) and Seatrain Lines, Inc.

1. Beginning in 1933, Sea-Land operated as a break-bulk¹ water carrier, except during the World War II years when all vessels employed in the deep-water coastal trade were requisitioned by the United States Government for national defense purposes. In 1957, Sea-Land suspended its Atlantic-Gulf coastwise break-bulk service and converted four vessels into crane-equipped trailerships each capable of holding 226 demountable highway trailers. As a consequence, it became possible for Sea-Land to provide a motor-water-motor service in which freight is moved in demountable trailers from the consignors over highways by certificated motor carriers or by use of Sea-Land's own motor equipment to the ports, whence the trailers are lifted onto Sea-Land ships for movement via water to the destination ports where the process is reversed. The conversion to the more efficient trailership service has reduced Sea-Land's operating costs and has brought about a reduction in the cargo-handling time and the in-port vessel time.

In Seatrain's service, freight is transported to its dock at Edgewater, New Jersey, in railroad cars. The cars and their contents are then lifted onto Seatrain's vessels for the water leg of the journey to Atlantic and Gulf ports served by Seatrain. At destination, the reverse operation occurs and the cars are delivered by rail to the consignee. Thus, it is

¹ Service of the break-bulk type involved the physical unloading of freight from rail car or truck and loading of the cargo into the ships and the reverse of this operation at destination.

a rail-water-rail, non-break-bulk service which offers to the shipper the transportation of his lading in a rail car from consignor to consignee.²

Railroad TOFC service is a motor-rail-motor operation in which the shipment leaves the consignor in a motor carrier trailer and arrives at the door of the consignee in the same trailer, the laden trailer having been transported in the line haul on a railroad flatcar. While this type of operation has been engaged in sporadically since 1926, its principal growth has occurred in recent years, and the rail TOFC service between points in the southwest and points in the east was inaugurated in the summer of 1956.

Traditionally, water rates, including water-rail and water-motor rates, have been maintained at levels differentially lower than the corresponding all-rail rates, principally because of disadvantages in the water service due to perils of the sea, slower transit time, and infrequency of sailings.³ When Sea-Land inaugurated its new trailership service in 1957, it published rates which, in general, were 5 to 7½ percent lower than the corresponding all-rail boxcar rates, but were less than the differentials which had existed by reason of the rates formerly maintained for the break-bulk service.

² Seatrain's operations have previously been before this Court in *United States v. Pennsylvania R. Co.*, 323 U.S. 612.

³ See *Class Rate Investigation*, 1939, 286 I.C.C. 5 (1952), the last major proceeding in which the rates of Atlantic-Gulf coastwise water carriers were considered, where the Commission prescribed reasonable maximum class rates on ocean-rail traffic designed to preserve the then-existing differentials of the ocean-rail rates under the all-rail rates.

2. By schedules filed to become effective on November 14, 1957, and later, the railroads proposed to establish the reduced TOFC rates at issue. Since the establishment of the reduced TOFC rates would leave higher rates in effect to and from intermediate points involving shorter hauls in violation of the long and short haul provisions of section 4(1) of the Act, 49 U.S.C. 4(1),⁴ the railroads also applied to the Commission for the relief from those provisions, which section 4(1) permits the Commission to authorize "in special cases." The proposed rates and the fourth section application were opposed by the Secretary of Agriculture, the Houston Port Bureau, the Port of New York Authority, the City of Providence, the New Orleans Traffic and Transportation Bureau, Sea-Land, Seatrains, and a motor carrier association. The rates were suspended and placed under investigation in the Commission's I. & S. Docket No. 6834, *Piggy-Back Rates—Between East and Texas*, which docket also embraced the fourth section application as well as certain effective Sea-Land and Seatrains rates between the same points the lawfulness of which are not at issue in this litigation. On December 19, 1960, the Commission issued its

⁴ For example, the normal TOFC rate on candy from Boston to Dallas is 290 cents per 100 pounds and the distance over a direct rail route is 1,965 miles, while the normal TOFC rate from Boston to Bald Knob, Arkansas, a distance of 1,543 miles, is 236 cents per 100 pounds. Plaintiffs propose to reduce the rate from Boston to Dallas to 214 cents per 100 pounds while maintaining the rate of 236 cents per 100 pounds for the shorter haul to the Arkansas destination.

report (313 I.C.C. 23, App. C, *infra*, pp. 53-127)⁵ and accompanying order.

The Commission found that the proposed TOFC rates equal or exceed out-of-pocket costs for hauls of average circuitry for all listed movements by TTX cars and for all but six movements by railroad-owned cars, and equal or exceed fully-distributed costs for 43 movements by TTX cars and for 14 movements by railroad-owned cars (App. C., p. 74).⁶ Consequently, with the exception of the six rates returning less than out-of-pocket costs,⁷ the proposed TOFC rates are compensatory (*id.* at 74, 87). Similarly, the corresponding Sea-Land rates, with one exception, were found to be compensatory

⁵This is a consolidated report embracing some 43 docket proceedings which were, in turn, consolidated into four dockets for hearing. The first of these consolidated dockets, I. & S. No. M-10415, *Commodities—Pan-Atlantic Steamship Corporation*, is the title under which the consolidated report is issued. The others are I. & S. No. 6834, *Piggy-Back Rates—Between East and Texas*; I. & S. No. 6906, *Commodities via Pan-Atlantic Between Texas, Louisiana and Florida*; and I. & S. No. M-11375, *Tires, Chemicals and Paints via Pan-Atlantic*. Under consideration in the three named dockets other than I. & S. No. 6834 were numerous rates of Sea-Land not at issue here. It was agreed that the evidence in each of the first two named dockets could be used in both to the extent relevant, and would be incorporated by reference in the last two named dockets. An examiner's report was filed in each of the four named dockets, and the Commission's Division 3 issued a report in I. & S. No. M-10415 (309 I.C.C. 587).

⁶TTX cars are flatcars leased by the railroads which hold two trailers, while railroad-owned cars have a capacity of one trailer per car (*id.* at 73). No finding could be made as to the relative percentages of the TOFC traffic which would move in either type of car (*id.* at 74, 90).

⁷These six rates were withdrawn by the railroads and are not at issue.

(*id.* at 72-73, 87), as were the Seatrain rates (*id.* at 77, 87).

With respect to the relative costs of the competing modes, the Commission found that the Sea-Land costs, both out-of-pocket and fully-distributed, are below the TOFC costs for all movements of comparable weight as computed for railroad-owned flatcars, and are below the TOFC costs for all except two of the 66 movements for TTX cars (*id.* at 73, 90). However, the Commission made it quite clear that it was not resting its decision in these proceedings on relative costs. Thus, after concluding that it couldn't determine the low cost mode because of certain variables which affect costs and the absence of rail costs as to many of the rates,⁸ the Commission said: "We must recognize, also, that cost is only one of the elements which may appropriately be considered in passing upon the lawfulness of rates. In the exceptional circumstances here presented, other considerations, herein discussed, appear to us determinative of the issues." (*id.* at 91).

The Commission found that uncertainty of ocean transport, infrequency of sailings, and longer transit time than by TOFC service are factors present in both Sea-Land and Seatrain service (*id.* at 79-81); that there is no indication that Sea-Land has moved any traffic at rates as high as competing all-rail boxcar

⁸ The absence of rail costs as to many of these rates refers to the rail costs for boxcar service, which was the competing rail service with respect to the numerous Sea-Land rates at issue in the other dockets embraced in the consolidated report which are not involved in this litigation.

or TOFC rates (*id.* at 73, 38) and it is conceded that Seatrain offers a lower quality service than TOFC (*id.* at 78); that most of the shippers prefer rail service to Sea-Land service except at lower rates for the latter (*id.* at 88); and that, in order to attract traffic, Sea-Land and Seatrain must establish rates somewhat below those of the rail carriers (*ibid.*). It also found (*id.* at 89) that all of the Sea-Land traffic is competitive with the railroads; that Sea-Land must recover its fully-distributed costs on its overall operations if it is to continue in operation; and that, if the differentially lower rates which Sea-Land must maintain to attract traffic in competition with the railroads were forced by such competition to be reduced to a point where they failed to recover operating costs plus a reasonable return, Sea-Land's operations would become unprofitable and their continuance threatened.

The Commission noted that while section 15a(3), 49 U.S.C. 15a(3), prohibits the holding of the rates of a carrier to a particular level to protect the traffic of another mode of transportation, that prohibition is qualified by the words "giving due consideration to the objectives of the national transportation policy declared in the Act." And it pointed out that "It is the declared national transportation policy, among other things, to provide for fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers, all to the

end of developing, coordinating,^o and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.” (*id.*

at 91-92). It expressly found (*id.* at 92) that “The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operations, and thus the continued existence, of the coastwise water-carrier industry generally.”

Next, the Commission summarized the facts showing the decline in the Atlantic-Gulf coastwise trade, both in the number of companies engaged in the trade and the tonnage carried (*id.* at 92-93). Quoting representative statements, the Commission noted that the importance of coastwise shipping for national defense purposes^o has been repeatedly emphasized from various governmental sources and that it is important for general public use as an integral part of the national transportation system (*id.* at 93-94). In addition, the Commission referred to the provisions of sections 305(c) and 307(d) of the Act, 49 U.S.C. 905(c) and 907(d), as indicative of a Congressional intent that, where necessary to permit an essential, efficiently-operated water carrier to participate in the economical movement of traffic, the water carrier service should be accorded some advantage in the form of lower rates.

^o For a recent example, see *Ocean Shipping to Support the Defenses of the United States*, Department of the Navy (1961), reproduced at 107 Cong. Rec. 7299-7302 (1961).

The Commission concluded (*id.* at 96): "In the circumstances presented here, we are of the opinion that the objectives of the national transportation policy require the establishment and maintenance of a differential relationship between the rates under investigation on sea-land and Seatrain service, on the one hand, and the rates of the rail carriers, on the other, which will allow these water carriers operating in the coastwise trade to maintain rates that will enable them to continue efficient and economical coastwise service." It then stated that a 10 percent differential sought by Sea-Land appeared to be excessive but that, in its judgment, the TOFC rates at issue should be maintained on a level no lower than 6 percent above Sea-Land's rates so long as the latter are not increased above their present levels (*id.* at 96-97). Accordingly, the Commission found the proposed reduced TOFC rates not shown to be just and reasonable, directed their cancellation without prejudice to the filing of new schedules in conformity with its conclusions, and denied the fourth section application for relief to establish the rates.

3. On February 2, 1961, the railroads filed suit in the district court to set aside the Commission's order to the extent that it required the cancellation of the TOFC rates. Sea-Land and Seatrain intervened and appeared in defense of the order. On November 15, 1961, the court rendered its opinion (App. A, *infra*, pp. 25-50), concluding that the order requiring cancellation of the TOFC rates should be set aside, and the Commission enjoined from cancelling TOFC rates

which return at least fully-distributed costs of carriage. Its judgment (App. B, *infra*, pp. 51-52) was entered on January 8, 1962.

The court held that the requirement of a rate differential to protect the water carriers is plainly holding up railroad rates to protect another mode in violation of section 15a(3), and that the evidence and findings do not support the Commission's position that the National Transportation Policy compels that result (App. A, pp. 31-32). At the heart of the court's decision is its construction of section 15a(3) as constituting a flat prohibition against differentials, except where a competing mode would be destroyed by rates set so low as also to harm the proponent or so low as to deprive the competing mode of its inherent advantage of lower costs¹⁰ (*id.* at 37-38). Consequently, it held that the Commission lacks power to reject compensatory rates to prevent the destruction of a competing mode unless the threatened mode is also the low cost mode (*id.* at 34-35, 37). In addition, the court held that, in order to be entitled to protection, the competing mode must be the "overall low cost mode," rather than the low cost mode with respect to the particular movements involved (*id.* at 42-43, 46); that, in any event, the Commission is prohibited from rejecting a rail rate for a particular movement if it yields the railroad's fully-distributed cost which is lower than the water carrier's fully-distributed cost (*id.* at 47); and that, despite the court's rejection of the Commis-

¹⁰ The court made it clear that determination of the low cost mode is to be made on the basis of fully-distributed costs (*id.* at 32-33).

sion's basis of decision, the Commission may find unlawful such TOFC rates as fail to yield fully-distributed cost (*id.* at 46).

THE QUESTIONS ARE SUBSTANTIAL

This case presents questions of fundamental significance respecting the role of the Commission and the statutory standards which properly govern its decisions in the increasingly important area of intermodal competitive ratemaking. Placing principal, if not exclusive, emphasis on its interpretation of section 15a(3), added to the Interstate Commerce Act in 1958, the district court has elevated relative costs to a pre-eminent position. The necessary effect of the court's decision is to substantially impair the viability of important provisions of the National Transportation Policy and to relegate the Commission to the role of a mere computer of costs. We submit that this result was never contemplated by Congress and is inconsistent with the express language of the Interstate Commerce Act, including section 15a(3).

1. Section 15a(3) was the culmination of several years of reports and hearings on the proper purpose and scope of the regulation of intermodal rate competition. In 1955, the President's Advisory Committee on Transport Policy and Organization, under the chairmanship of the Secretary of Commerce, issued a report, sounding the keynote that "Increased reliance on competitive forces in rate making con-

stitutes the corner-stone of a modernized regulatory program," recommending a revision in the National Transportation Policy, and specifically recommending the elimination of the phrase "unfair or destructive competitive practices."¹¹ The Committee proposed the following new ratemaking rule:¹²

In determining whether a rate, fare, or charge, or classification, regulation, or practice to be applied in connection therewith, results in a charge which is less than a reasonable minimum charge, as used in this Act, the Commission shall not consider the effect of such charge on the traffic of any other mode of transportation; or the relation of such charge to the charge of any other mode of transportation; or whether such charge is lower than necessary to meet the competition of any other mode of transportation. * * *

This proposal, containing what became known as the "three shall nots," was supported by the railroads and opposed by the water and motor carriers,

¹¹ *Revision of Federal Transportation Policy*, Report by President's Advisory Committee on Transport Policy and Organization (1955), reprinted in *Transport Policy and Organization*, Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 84th Cong., 1st Sess. (1955).

¹² Proposed section 15a(1) in H.R. 6141, 84th Cong., 2d Sess. (1956), reprinted in *Transportation Policy*, Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess., Part 1, at 5 (1956).

the Commission, and independent experts. It eventually died in committee;¹³ and, in its place, Congress passed the present section 15a(3), reading as follows:

In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

In its report on the Transportation Act of 1958, which included section 15a(3) as finally adopted, the Senate Committee on Interstate and Foreign Commerce stated that:

[The section] is designed to encourage competition in transportation by allowing each form of transportation subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to

¹³ By letter dated April 22, 1958, the Secretary of Commerce, withdrew his support for the "three shall nots," and unsuccessfully urged antitrust standards for determining the lawfulness of competitive rate reductions. *Problems of Railroads*, Hearings before the Subcommittee on Surface Transportation of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., Part 4, at 2353 (1958).

offer, with such ratemaking being regulated by the Interstate Commerce Commission, however, to prevent "unfair or destructive competitive practices" as contemplated by the declaration of national transportation policy. Under the committee amendment the principal emphasis, but not the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies.¹⁴

In reporting the bill, the House Committee commented to substantially the same effect, specifically enjoining the Commission to give "due consideration to the objectives of the national transportation policy declared in the Interstate Commerce Act."¹⁵

2. We submit that the district court erred in holding that the Commission lacks power to reject compensatory rates to prevent the destruction of a competing mode of transportation unless the threatened mode is also the low cost mode. Such a result is inconsistent with the objectives declared in the National Transportation Policy, which is "the yardstick by which the correctness of the Commission's actions will be measured" (*Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88) and "the Commission's guide to the public interest" (*McLean Trucking Co. v. United States*, 321 U.S. 67, 82), and may not properly be inferred from the language or legislative history of section 15a(3).

¹⁴ S. Rep. No. 1647, 85th Cong., 2d Sess. 3-4 (1958).

¹⁵ H.R. Rep. No. 1922, 85th Cong., 2d Sess. 13-15 (1958).

On numerous occasions prior to the enactment of section 15a(3), the Commission has rejected proposals for reduced but compensatory rates when convinced that the challenged rates would lead to the destruction of competing modes.¹⁶ In fact, in at least two cases, courts have set aside orders of the Commission approving rate reductions for failure of the Commission to consider whether the rates would lead to the extinction of competing modes. See *Pacific Inland Tariff Bureau v. United States*, 129 F. Supp. 472 (D. Ore. 1955), *motion for new trial denied*, 134 F. Supp. 210 (1955); *Cantlay & Tanzola, Inc. v. United States*, 115 F. Supp. 72 (S.D. Cal. 1953).¹⁷ And in *Scandrett v. United States*, 32 F. Supp. 995, 997-998 (D. Ore. 1940); *aff'd*, 312 U.S. 661, before the enactment of the National Transportation Policy, the court held that the Commission had the power to fix minimum rates for the railroads so that they could

¹⁶ *Pig Iron from Rockwood, Tenn., to Chicago and Joliet*, 298 I.C.C. 430 (1956); *Petroleum Products in California and Oregon*, 284 I.C.C. 287 (1952); *Petroleum Products in Illinois Territory*, 280 I.C.C. 681 (1951); *Pig Lead from Brownsville, Tex., to Chicago and St. Louis*, 280 I.C.C. 585 (1951); *Petroleum Products from Los Angeles to Arizona and New Mexico*, 280 I.C.C. 509 (1951).

¹⁷ *Cf., Columbia Transportation Co. v. United States*, 167 F. Supp. 5 (E.D. Mich. 1958) and *National Water Carriers Assn. v. United States*, 120 F. Supp. 719 (S.D.N.Y. 1954), sustaining orders of the Commission approving rail rate reductions on the ground that the traffic would continue to be available to both the railroads and the water carriers with no danger of destroying the latter.

not put an end to the existence of water competition.¹⁸

Moreover, this Court has pointed out that with the evolution of other forms of carriage than transportation by rail, the Commission was charged with seeing that the rates and services of each are coordinated in accordance with the National Transportation Policy which was designed to eliminate destructive competition among the different forms of carriage, *Eastern-Central Assn. v. United States*, 321 U.S. 194, 205-206, and that whether factors of cost or competition control is a choice for the Commission to make in its informed judgment, *id.* at 210. The decisions of this Court and of the Commission have repeatedly rejected the suggestion that costs must control in ratemaking. *Alabama G.S. R. Co. v. United States*, 340 U.S. 216, 223, n. 4, and cases cited there. And in *New York v. United States*, 331 U.S. 284, 346, the Court said:

These cases, to be sure, recognize the power of the Commission so to fix minimum rates as to keep in competitive balance the various

¹⁸ H.R. Rep. No. 456, 66th Cong., 1st Sess. 19 (1919), accompanying the Transportation Act of 1920 which conferred the minimum rate power on the Commission, was quoted by the court as follows:

“[The minimum rate power] would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its water competitor. Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of rates as to make it impossible for the water carrier to survive. When once competition was thus driven off the rail rates would be restored or would rise to even higher levels. * * *”

types of carriers and to prevent ruinous rate wars between them. That plainly is one of the objectives of the Act, and one of the reasons why the Commission was granted the power to fix minimum rates by the Transportation Act of 1920. * * *

The decision of the district court would severely limit the scope of the phrase "destructive competitive practices" in the National Transportation Policy and virtually read out of the Act the express command of the Policy that the Commission "foster sound economic conditions in transportation and among the several carriers" and administer the Act "to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." But the obligation of the Commission to give due consideration to the objectives of that Policy was expressly reaffirmed in section 15a(3).¹⁹ Clearly, the court's deci-

¹⁹ Nothing in the 1958 amendment or its legislative history wipes out those provisions of sections 305 and 307 which the Commission found "indicative of the Congressional intent" to preserve a place in the national transportation system for efficiently operated water carriers.

A sharply differing opinion than that of the district court as to the proper interpretation of section 15a(3) is illustrated by *Decline of Coastwise and Intercoastal Shipping Industry*, Report of the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess. (Comm. Print, 1960), which emphasizes the objective "sought above all else to foster a national transportation system by water, highway, and rail" (p. 21); recognizes that "destructive competition" can have no meaningful

sion raises a substantial question having far-reaching consequences for the transportation industry.

3. Other aspects of the district court's decision introduce novel concepts having serious consequences for future administration of the Interstate Commerce Act in the area of intermodal competitive ratemaking. Thus, the court held that, in order to be entitled to protection, the competing mode must be the "overall low-cost mode" or "in general the low-cost mode," rather than the low cost mode with respect to the particular movements involved. This would appear to mean that there must be cost data respecting the overall operations of the competing modes from which the Commission can determine that one or the other of the competing modes is the lower cost mode in terms of its overall operations. Heretofor, in competitive ratemaking proceedings, only cost data respecting the particular movements for which rates are proposed have been required or presented, since only those rates and movements are at issue. Representative cost data on this limited basis are difficult enough to adduce. It will be readily appreciated that to make the comprehensive study and determination required by the court would impose an insuperable burden on the parties and the Commission.

definition unless its necessary component—"meet the competition"—takes into account the need for differentially lower rates by water" (p. 45); and states that "The express incorporation of the national transportation policy in the rule of ratemaking is a matter of substance, requiring the Commission to examine a proposed competitive rate for destructive effect as well as destructive intent to the end that a balanced and healthy transportation system by all modes is to be preserved" (p. 50).

The court has also held that, even should the Commission find the water carriers to be the low cost mode in general, the Commission may not reject any rate for a particular movement which yields the railroad's fully-distributed cost which is lower than the competing water carrier's fully-distributed cost for that movement. This would seem to mean that the Commission may not halt a rate war until the rates for particular movements have come down to the fully-distributed costs of the low cost mode. It ignores the fact that on many high value commodities rates are, and, whenever conditions permit, should remain at a level substantially above fully-distributed costs.²⁰ See, e.g., *Tobacco from North Carolina to Central Territory*, 309 I.C.C. 347 (1960); *Alcoholic Liquors in Official Territory*, 283 I.C.C. 219 (1951). This "value of service" concept gives recognition to the obvious fact that commodities differ greatly in their value, hence have differing abilities to absorb the costs of transportation. As an essential element of the existing rate structure, it insures that adequate transportation is available to move the low value commodities (many of which will only move at rates slightly above out-of-pocket costs) as well as those of higher value. At a number of places in its opinion, the court has apparently confused costs and revenue needs, and has erroneously assumed that value of service considerations are subsumed in fully-distrib-

²⁰ The commodities involved here are relatively high value manufactured or processed goods as to which there was no contention that the rates of the competing water carriers are too high.

uted costs (App. A, *infra*. pp. 40-41).²¹ This may account for the holding here.

Finally, we note that despite its rejection of the Commission's basis for decision, the court would apparently permit the rejection of the TOFC rates which do not yield fully-distributed costs. We are frankly puzzled concerning the basis for this holding, unless the court does not accept the Commission's view that rates above out-of-pocket costs but below fully-distributed costs are not necessarily to be rejected as non-compensatory.

4. The importance of the questions raised by the district court's decision is underscored by the fact that it has been recently cited as of "controlling importance" by a three-judge court in the Eastern District of Missouri in *Missouri Pacific Railroad Co., et al. v. United States, et al.*, Civil Action No. 61 C 380(1), decided March 19, 1962, judgment entered April 20, 1962, setting aside a Commission order rejecting reduced rail rates in Docket No. 33334, *Exceptions Ratings on Agricultural Road Making and Other Articles*, 315 I.C.C. 9 (1961). In view of the increasing volume of these intermodal competitive ratemaking cases involving every mode of surface

²¹ While the court discussed, and commented on adversely, the Commission's methods of determining costs (App. A, *infra*, pp. 40), this was a matter neither challenged before the Commission or the court nor briefed. To the extent that this discussion is not dictum, we will also contend that it relates to matters committed to Commission judgment in the first instance, as this Court has held. See *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 615; *Illinois Commerce Commission v. United States*, 292 U.S. 474, 481.

transportation, we submit that prompt resolution of the questions presented by this appeal is essential.

CONCLUSION

For the reasons stated, we believe that the questions presented by this appeal are substantial and are of such public importance as to require plenary consideration, with briefs and oral argument, for their resolution.

Respectfully submitted.

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Washington 25, D.C.

MAY 1962.

APPENDIX A

United States District Court, District of Connecticut

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, DEFENDANTS

SEA-LAND SERVICE, INC., AND SEATRAN LINES, INC.,
DEFENDANTS-INTERVENORS

Civil Action No. 8679.

Before: HINCKS, Circuit Judge, and ANDERSON and
TIMBERS, District Judges.

Action by plaintiffs-railroads, brought under 49
U.S.C. § 17(9); 28 U.S.C. §§ 1336, 1398, 2284 and
2321-2325; and 5 U.S.C. § 1009, to enjoin, annul and
set aside an order of the Interstate Commerce Com-
mission, 313 I.C.C. 23, directing the cancellation of
plaintiffs' proposed reduced trailer-on-flat-car
(TOFC) rates on various commodities.

HINCKS, Circuit Judge:

This is an action brought by several railroads to
enjoin an order of the Interstate Commerce Commis-
sion, entered pursuant to a report¹ published in
313 I.C.C. 23, directing them to cancel substantial rate

¹ Reference in this opinion to the report will employ the
pagination of 313 I.C.C., thus: "R. 1(2, 3, etc.)."

reductions for 66 listed movements of their trailer-on-flat-car (TOFC) service between points in the East and Texas. Two water carriers, Sea-Land Service, Inc. (hereinafter referred to as Sea-Land), and Seatrain Lines, Inc. (hereinafter Seatrain), protested the proposed rates and appeared herein to defend the order below. The United States and the Interstate Commerce Commission also appeared herein and defended the order. They will be referred to collectively as "the government."

Sea-Land, known in the proceedings before the Commission by its former name Pan-Atlantic Steamship Corporation, in 1957 had suspended its domestic break-bulk freight service, theretofore operated between eastern ports and Southern Atlantic and Gulf ports. It substituted four "trailer-ships," each of a capacity to carry 226 standard, demountable, truck trailer-bodies, and each equipped with cranes capable of lifting the loaded trailers from their chassis on the pier, stowing them aboard, unopened, into cooperating slots and, at the ports of destination, lifting them onto trailer-chassis on the pier. By this improved highway-water-highway "fishy-back" service, Sea-Land offered a door-to-door service to all shippers and consignees accessible by highway in containers loaded or unopened between the point of origin and destination. The conversion from break-bulk service to the "fishy-back" service just described enabled Sea-Land to improve the quality of its service and reduce operating costs at rates which, prior to 1957, were five to ten percent below the rail boxcar rates.

Seatrain offers rail-water-rail service whereby loaded railroad cars are taken aboard its three steamships at Edgewater, New Jersey and after carriage by sea to a destination in a southern coast or a Gulf port are then carried by a railroad for delivery to the

consignee. Seatrain contemplates a modification of this service, a so-called "seamobile service," whereby the freight will be carried in special containers which may be readily transferred from highway trailers or railcars to and from its seagoing vessels. Like railroad boxcar service, the present Seatrain service permits carriage from shipper to consignee without breaking bulk only when shipper and consignee are located on railroad sidings.

To compete with these services and especially that of Sea-Land which is available to shippers and consignees without rail access, the railroads considerably extended their "piggy-back," highway-rail-highway, service, whereby trailer-bodies, without detachment from their chassis, are hauled onto and tied down upon railroad flatcars, one or two to each flatcar, and at the rail destination are hauled by tractors to the consignees' doors. Prior to 1957 the rates set for this TOFC service were generally on a parity with those in force for regulated motor-carrier service and somewhat higher than the rail boxcar rates. But to make their competition with Sea-Land's fishy-back service more successful, the railroads in 1957 filed rate schedules for their TOFC service which were substantially on a parity with Sea-Land and Seatrain rates, R. 33, and motor common carrier rates, R. 45. However, these rate schedules, since inaugurated as an experiment, were limited to 66 commodity movements from particular eastern points to Fort Worth and Dallas and return.

On petitions of Sea-Land, Seatrain, a motor-carrier association, the Secretary of Agriculture, and several municipal authorities, the Commission placed all the TOFC rates in this initial, or pilot, schedule under suspension and investigation under I. & S. Docket No. 6834—"Piggy-Back Rates—Between East and

Texas," which also covered the lawfulness of Sea-Land rates between the same points and certain Seatrain rates. This controversy, together with three others involving the lawfulness of numerous other Sea-Land rates, each under separate docket numbers, I. & S. Docket No. M-10415, I. & S. Docket No. 6906, and I. & S. Docket No. M-11375, came on for hearing before Examiner Morgan who filed a separate report on each. On exceptions by the parties, No. M-10415 was heard by Division 3 of the Commission and on further exceptions by the railroads to the Division 3 report all four docket numbers were consolidated for hearing and dealt with in a consolidated report² by the entire Commission.

The Commission held³ that the entire schedule of TOFC rates was unlawful and, in the order under attack herein, directed that the rates, which had theretofore been under suspension, be canceled. This cancellation date, however, was ordered suspended, thus leaving the rates in continuing suspension. It was to set aside the cancellation order as to the TOFC schedule that the railroads brought this action. Except for a few specific rates, the Sea-Land and Seatrain rates were found lawful and to this holding no exception had been taken to the Division 3 report.

² This report embraced 43 docket proceedings.

³ Its report was adhered to by five Commissioners. Commissioner Hutchinson concurred on the ground that the proposed schedule constituted a destructive competitive practice. Commissioner Freas, in a dissenting report in which Chairman Winchell and Commissioner Webb joined, dissented on the ground that the Interstate Commerce Act as amended neither required nor permitted "b. . . protection for the water carriers." Commissioner McPherson, concurring in part, said: "I would approve all the rates which are compensatory but on this record I would not impose any differential." Only ten Commissioners were then in Office.

The Commission's essential findings as enunciated by five of the Commissioners in its report were as follows:

1. The proposed TOFC rates would produce revenues exceeding out-of-pocket costs (see Appendix A *infra*) for all of the proposed movements by TTX flatcars⁴ and for all but six of 66 of the listed movements by railroad-owned cars,⁵ and exceeding the railroads' fully-distributed costs (see Appendix A) for 43 of the 66 movements by TTX cars and 14 movements by railroad-owned cars. R. 36. Consequently, except for the six rates returning less than *out-of-pocket* costs⁶ the TOFC rates were found to be compensatory.⁷ The corresponding Sea-Land rates, with one exception, were similarly found to be compensatory, as were the Seatrain rates.

2. As to the 66 movements in issue here, Sea-Land costs, both on an out-of-pocket and a fully-distributed basis, were lower than TOFC costs except for two (out of the 66) movements accomplished by TTX cars. However, railroad boxcar costs on some of this traffic were lower than Sea-Land costs; on other portions of the traffic, Sea-Land costs were lower. On the record before it the Commission said it "can not determine * * * where the inherent ad-

⁴ Flatcars on lease by the railroads capable of carrying two trailers.

⁵ The conventional railroad-owned cars are generally capable of carrying only one trailer. As the Commission observed, the choice between 1- or 2-trailer cars "would rest entirely with the railroads."

⁶ These six rates the railroads withdrew and they are not in issue in this litigation.

⁷ The report makes it plain that the Commission considered that rates yielding in excess of out-of-pocket costs were "compensatory."

vantages may lie as to any of the rates in issue."* R. 46.

3. In quality of service, the several modes rated in the following order: TOFC, all-rail boxcar, sea-land and Seatrain. However, "the most important, and usually the determinative factor to the shippers as a whole is the measure of the rates."* R. 29.

4. All Sea-Land traffic is competitive with the railroads. But only a fraction of railroad traffic is competitive with Sea-Land. R. 45.

5. The railroads intend, if the proposed TOFC rates attracted profitable traffic, to extend the reductions in TOFC rates to many other movements than the 66 immediately involved herein. R. 47.

6. Sea-Land must recover fully-distributed costs to remain in business. R. 38.

On conclusions thought to follow from these findings, the Commission ordered the proposed TOFC rates cancelled, holding that, "the rail TOFC rates on the commodities from and to the points concerned in I. & S. No. 6834 should be maintained on a level no lower than 6 percent above * * * sea-land rates, so long as the latter are not increased above their present levels." And its order was expressly stated to be "without prejudice to the filing of new schedules in conformity with the conclusions herein." R. 50. [Emphasis supplied.]

* The Commission pointed out that both the TOFC and the Sea-Land service were subject to certain variables not measurable in the record before it.

* The Commission, after describing the various competing services, concluded that "the preponderance of the testimony on these records is to the effect that most of the shippers prefer rail service to sea-land except at lower rates for the latter." This, obviously, indicates recognition of some quality-of-service superiority in dependability and speed for overland as against water transport. R. 44. See also R. 38-40.

We hold that, at least on this record, the requirement of a rate differential to protect the water carriers violated the 1958 Amendment to the Interstate Commerce Act, now appearing as 49 U.S.C. § 15a(3), which reads as follows:

"In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

In disapproving the proposed schedule of the railroads the Commission, contrary to the specific prohibition of the 1958 amendment, is plainly holding up railroad rates "to protect the traffic" of another mode. It argues, however, that the national transportation policy (hereinafter sometimes referred to as NTP),¹⁰ to which it is commanded to give "due

¹⁰ The Congressional declaration of the National Transportation Policy was introduced into the Interstate Commerce Act by the Transportation Act of 1940, 54 Stat. 899, and now appears in the United States Code (1958) preceding §§ 1, 301, 901, and 1001 of Title 49:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable

consideration" by the same provision, compels this result. The evidence and findings do not support this argument.

The first policy-factor mentioned in the NTP declaration is to "recognize and preserve the inherent advantages of each [mode of transportation]." By "the inherent advantages" was meant the ability of a mode of transportation over the long run to provide a transportation service more acceptable to its shippers, by reason of quality or price, than that offered by a competing mode. That the calculation was to be long-run must be emphasized. The shorter-run "out-of-pocket" costs of one mode (e.g., railroads) may be lower than the longer-run "fully-distributed," or even the shorter-run costs of competing modes (e.g., water carriers) whose long-run costs are lower. When they are, rates set by reference to out-of-pocket costs may favor what in the long run is the less efficient, higher-cost mode. Thus the "inherent advantages" of lower cost (or better service, which is discounted for price) refers to the long-run, or fully-

charges for transportation services, without unjust discriminations, undue preferences, or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

distributed, costs of carriage." It was thought undesirable that one mode should undercut the rates of a competing lower-cost mode. Such conduct savored of a predatory competitive practice. See *Dixie Carriers v. United States*, 351 U.S. 56, 59, and n. 5 (1956). And generally it was possible to destroy a lower-cost carrier or mode only by reducing rates, at least temporarily, to a level below the costs of

¹¹ See *Dixie Carriers v. United States*, 351 U.S. 56, 59 (1956) ("lower cost of equipment, operation, and therefore service"; Congress' fear was lowering of rates by "strong" carriers, putting more efficient carriers out of business, citing 84 Cong. Rec. 5874); Statements of Chairman Freas before the Senate Committee on Interstate and Foreign Commerce, Hearings on S. 3778, 85th Cong., 2d Sess. (1958) ("In many instances, however, the full cost of the low-cost form of transportation exceeds the out-of-pocket cost of another. If, then, we are required to accept the rates of the high cost carrier merely because they exceed its out-of-pocket costs, we see no way of preserving the inherent advantages of the low cost carrier."); Colloquy between Senators Kefauver and Smathers, 104 Cong. Rec. 10839 (1958) ("Mr. Kefauver: * * * Some people have expressed the belief that under [15a(3)] it would be possible for one type of carrier to lower its rate to such an extent that another carrier would not be able to compete fairly on the basis of charging the overhead to that other carrier. There is nothing in [15a(3)], is there, which would enable one carrier to take undue advantage of another carrier * * *?" "Mr. Smathers: No. The answer is no.")

It will be observed that Congress had very different ideas as to what out-of-pocket and fully-distributed costs are than did the Commission. If Congress had realized that "railroad operating expenses include virtually all important railroad costs except property taxes and interest payments," see Appendix A, *infra*, it might have acted differently. But that, of course, is not a matter for our decision.

either. It well may be that for the higher-cost mode to jeopardize the continued existence of a lower-cost mode by setting rates below the costs of each, could be characterized as a "destructive competitive practice" which under another NTP policy-factor was not to infect the "reasonable charges for transportation services" which the Commission was authorized to approve. But that is not this case, as we will now proceed to show.

The Commission in its report expressly admitted (R. 46) that, "we can not determine on these records where the inherent advantages may lie as to any of the rates in issue." It thus made it plain that it did not rest its holding on the "inherent advantages" factor of the NTP. Instead, it turned to another NTP factor to justify its decision. It said, at R. 44, the "TOFC rates here under investigation, with the few exceptions noted, appear to be compensatory. Many of these are above the fully-distributed costs shown, and with the exceptions mentioned, all are above out-of-pocket costs. The next, and the most important, question is whether these rates constitute destructive competition." (Emphasis supplied.) And that the Commission did, at least in part, base its decision upon a holding that the proposed TOFC rates were an "unfair or destructive competitive practice" such as it thought frowned upon by the NTP, is demonstrated by its statement that: "The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence, of the coastwise water-carrier industry generally." R. 47. Apparently the Commission thought that any

rate-competition which threatens the continued existence of a competitor it had power to prevent as a "destructive competitive practice," irrespective of whether the challenged rates were compensatory to the proponent thereof or whether the mode of the contesting competitor was a lower-cost mode than that of the proponent.¹² This, we hold, has an erroneous interpretation of the Act, as amended.

Even before 1958, it would have been erroneous to hold that irrespective of other factors rates were unlawful merely because they would destroy carriers operating under different modes of transportation. In *Schaffer Trans. Co. v. United States*, 355 U.S. 83, 91 (1957), it was said that "[t]he ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of 'inherent advantage' that the congressional policy requires the Commission to recognize."

Prior to 1958, the Commission's emphasis as between different factors of the NTP had vacillated; now allowing rate reductions to "recognize and preserve * * * inherent advantages," see *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, and later shifting its stress to "coordinating * * * a national transportation system" even at the cost of stifling compe-

¹² That the Commission considered itself vested with a power of such sweeping breadth is further demonstrated by its stated conclusion herein (R. 50) that the water carriers must be favored by a differential under railroad boxcar rates, albeit a somewhat smaller differential than the 6% differential required of TOFC rates. Yet as to boxcar costs the Commission had found only that on some of this traffic Sea-Land "is shown as the low-cost agency; on the other traffic, the railroads' costs appear to be lower." R. 46. This surely falls far short of a finding that Sea-Land's is the low-cost mode.

tition, as in *A. W. Schaffer Extension—Granite*, 63 M.C.C. 247, rev'd sub. nom. *Schaffer Trans. Co. v. United States*, *supra*.

Against this background of vacillation, the Transportation Act of 1958 was adopted. We think that, on the whole, the amendment of section 15a was intended to provide freer play for competition as between different modes while still continuing protection to the modes having the inherent advantage of low cost from unfair or destructive competitive practices. In this the Congressional history, while perhaps not conclusive, bears us out. In H.R. Rep. No. 1927, 85th Cong., 2d Sess. (1958), 2 U.S.C.A. 3470 (1958), it had been said: “* * * The Interstate Commerce Commission has not been consistent in the past in allowing one or another of the several modes of transportation to assert their inherent advantages in the making of rates.” This House Report on § 15a (3) in its final form said, further: “The effect of this amendment will be to encourage competition between the different modes of transportation for the benefit of the shipping public.” It quoted with approval the above excerpt from the opinion in *Schaffer Trans. Co. v. United States*, *supra*.

The report of the Senate Committee of June 3, 1958 (S. Rep. No. 1647, 85th Cong., 2d Sess.) said of § 15a (3) in its final form,

“The committee wishes further to emphasize that the amendment in regard to section 5 amending section 15a of the act as framed by the committee is *designed to encourage competition* in transportation by allowing each form of transportation subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to

offer, with such ratemaking being regulated by the Interstate Commerce Commission, however, to prevent 'unfair or destructive competitive practices' as contemplated by the declaration of national transportation policy. Under the committee amendment *the principal emphasis*, but not the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation *will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies.*" [Emphasis supplied.]

Having in mind that by the 1958 amendment Congress for the first time articulated an express, though qualified, prohibition against holding up the rates of one mode to protect another, a prohibition accompanied by a direction that consideration shall be given to the effect of rates on the carrier for whom they are prescribed, we are unable to accept the contention in the government's brief that "section 15a(3) brought about no fundamental change in the law." We think that Congress in adopting the 1958 amendment, which its committees thought would encourage competition, did not intend the included prohibition of compulsory rate differentials to be qualified merely because of the adverse effect of rate competition on another mode of transportation even if carried to the point of rendering one mode of transportation obsolete and hence unable to survive. Instead, we think, the differential-prohibition was intended to be qualified only when factors other than the normal incidents of fair competition intervened, such as a practice which would destroy a competing mode of transportation by setting rates so low as to be hurtful to the proponent as well as his competitor or so low as

to deprive the competitor of the "inherent advantage" of being the low-cost carrier. The "inherent advantage" factor and the "destructive competitive practice" factor were the only two policy factors mentioned in the committee reports. We think the reference to the NTP in § 15a(3) indicates an intent that the differential prohibition was to be qualified only when necessary because of the interplay of these two factors.

We cannot help wondering if the Commission's obvious reluctance to accept as critical the relative costs of service by the competing modes of transportation may not be attributable less to its interpretation of the applicable law than to its fear that the process which it has developed of so-called value-of-service ratemaking will be jeopardized if it be required to make critical findings as to the comparative costs of competing modes of transportation.

Value-of-service ratemaking is a price-discrimination device, used either to maximize profit or to subsidize certain interests. As a maximizing tool, it can be used by a monopolist in the following way. M has a product—transportation—with two potential buyers, A and B. A uses it to ship industrial sand which he sells for \$10 a ton, B to ship coal which he sells for \$35 a ton; M's cost of shipment is the same for both. If he sets a uniform rate per ton of \$2, B will ship but A will not—he will not be able to meet his competition at the market. If M sets his price at a uniform \$1 per ton, both will ship—but M will lose a greater revenue which he could have garnered from B. And if M's out-of-pocket cost of carriage is \$0.75 per ton, he will want A's \$1 traffic. Early railroads thus developed the practice of charging \$2 to B and \$1 to A, cost of carriage notwithstanding.

This value-of-service pricing is not necessarily unsound economically. Economists generally agree that:

“Preferential rates relieve rather than burden other traffic if two conditions are fulfilled. These are (1) that the rate must more than cover the direct costs; and (2) that the traffic will not move at higher rates.”¹³

And the ICC, partly because this was the rate pattern prevailing when the Commission was established, and partly to maximize utilization of the railroads, adopted value-of-service as its own criterion of ratemaking.

The Commission, however, added factors of discrimination other than profit maximization. One of these is subsidization of certain commodities producers, perhaps under political pressures. Thus corn is carried at 85 percent of out-of-pocket costs; beets at 57 percent; gravel and sand at 88 percent; logs, at 62 percent. And of course, passenger traffic has been carried at a loss for some time. These losses are made up on other traffic, such as gasoline, 135 percent; equipment parts, 236 percent; and metal alloys, 264 percent.¹⁴ Other discriminations sometimes introduced by the I.C.C. are attributable to its desire to act as an economic planner, see, *e.g.*, *Anchor Coal Co. v. United States*, 25 F. 2d 462, 470 (1928).

These official discriminations, hallowed and entrenched by time and inertia, now pervade the rate structure; indeed they are the rate structure. The rates on high-value commodities are thus twice subject to arbitrary boosting. First, they bear as part of

¹³ Locklin, *Economics of Transportation* 158 (1954).

¹⁴ These figures are from ICC, *Bureau of Accounts & Cost Findings, Distribution of Rail Revenue Contribution by Commodity Groups, 1952, Table 12* (1955).

their "cost" the subsidies extended to traffic which does not pay the out-of-pocket cost of its carriage. And second, high-value commodities are expected to yield for the carriers a profit above their fully-distributed costs sufficient to compensate for any deficiency in the fully-distributed costs of other traffic.

This disquisition may help to an understanding of what the I.C.C. attempted and did in this controversy. It serves to point out that "cost" as used by the I.C.C. is a term of art. "Fully-distributed costs" of operation are actually the I.C.C.'s estimate of returns necessary to continued profitable operation. "Fully-distributed cost" of a given service is a largely arbitrary estimate of the proportion of system "costs" which the I.C.C. feels a given service should contribute to total revenue. For example, under the Commission's scheme of ratemaking the "fully-distributed cost" of the TOFC freight service is set at a level high enough to absorb, in addition to direct freight expenditures, the TOFC "share" of the eastern railroads' passenger-operations deficit. See Appendix A.

Thus the Commission was inhibited, by the terms of its own analysis, from a meaningful comparison of TOFC's cost to Sea-Land's cost. The "costs" of TOFC for these 66 movements were the sum of the following components: direct TOFC costs, a judgment of the appropriate shares of subsidy owned by TOFC to other railroad traffic, and an estimate of what contribution to total railroad revenue the high-value commodities here involved should make. Except for the application of value-of-service criteria Sea-Land "costs" were not complicated by these extrinsic factors. In short, under the Commission's scheme, TOFC costs and Sea-Land costs were incommensurate quantities.

But this lack of real significance in its cost comparisons is almost academic when set against the Commission's method of decision. That process, as nearly as we can trace it, was as follows. First, Sea-Land's overall revenue needs were calculated by the process outlined in Appendix A. Value-of-service criteria were then applied to determine the share of its needs to be met by the commodities in question. From this figure was derived the "fully-distributed cost" of Sea-Land's carriage of these items. The railroads, in effect, were then ordered to leave the traffic with Sea-Land by maintaining their rates at a 6 percent differential. This conclusion was bolstered by a recital of TOFC "costs" computed as we have seen on an essentially different basis. The effect was to obscure, rather than illuminate, the identification of the "low-cost" mode.

If, instead of cancellation, the disposition of the proposed rates had been one of approval, and forced Sea-Land to reduce its own rates on the commodities involved, it is true that the substantial extra margin of profit the Sea-Land rates provide for the company as a whole, which is available to augment the lower profits from the revenues of low-value movements, will be reduced. This, we think, is what the Commission meant when it said: "The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence, of the coastwise water-carrier industry generally." R. 47. Apparently, the Commission thought that any competition having such effect on water carriers, i.e., to reduce rates on high-value commodities, was necessarily "an unfair or destructive competitive practice" within the meaning of the statutory declaration of the NTP.

Such an interpretation of the Commission's decision might avoid some of the difficulties we find with that order; for example, it would explain why the Commission refused to allow TOFC rates to be lowered to a level still above the railroads' fully-distributed costs. But if the Commission decision does represent such an attempt to preserve its value-of-service ratemaking structure, the decision must fall for lack of evidence and necessary findings. For the Commission would have been warranted in holding up the TOFC rates for these 66 movements to protect an *integral overall rate structure* for Sea-Land only on evidence and findings that, notwithstanding the § 15a(3) prohibition of differentials, the *integral overall rate structure* was required by one or more of the policy-factors enumerated in the NTP, and particularly the policy to protect the "inherent advantages" of the overall structure against "destructive competitive practices" and "the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service." Sec. 15a (2).

There was no finding here that the *overall rate structure* of Sea-Land which the Commission sought to preserve was that of the *overall low-cost mode*. This finding the Commission refused to make; indeed it could not, for as it said, "we do not have before us the rail costs as to many of these rates * * * we can not determine on these records where the inherent advantages may lie as to any of the rates in issue." True, it found that as to many of the 66 movements in question, Sea-Land was a lower-cost mode than TOFC; but it did not find that Sea-Land service was in general a lower-cost mode than railroad service in general. All-rail boxcar service, as well as TOFC, competes with Sea-Land, and as to many boxcar rates

the Commission's finding was, "the railroads' costs appear to be lower." R. 46. Yet the Commission concluded that Sea-Land was entitled to protection against boxcar competition, as well as TOFC competition, though by a differential "somewhat lower" than the 6% prescribed for TOFC. R. 50. See also I.C.C. I. & S. Docket No. 7454 (May 18, 1961). We conclude that, for lack of evidence and findings that Sea-Land was in general the low-cost mode, the action of the Commission, in so far as it sought to protect Sea-Land's overall rate structure, was an unlawful interference with the forces of competition fostered—not proscribed—by § 15a(3).

For its disregard of the differential-prohibition the Commission also places reliance on the "national defense" clause of the NTP. In this too, we think the Commission misinterpreted the law. True, the hoped-for "end" of the National Transportation Policy is a system "adequate to meet the needs * * * of the national defense." But the national defense is not stated as an operative policy or means: it is mentioned only as the hoped-for "end" of the operative policy-factors previously enumerated. It is not stated, and we think not intended, as a blanket grant of power to the Commission effective to nullify the express prohibition of rate differentials. By its emphasis on the supposed needs of national defense the Commission overrides the express prohibition of rate differentials without invoking, and without basis for invoking, the two policy-factors of the NTP, discussed above, which may properly qualify that prohibition. Its stress on national defense also brings it into conflict with all three policy-factors enumerated in § 15a(2), viz., the effect of the TOFC proposed rates on the TOFC carriers, the public need of railroad service at the lowest compensatory rate,

and the carriers' need for compensatory revenues. These three factors are as much a part of the national policy as the several policy-factors in the NTP declaration. Even if these factors were deemed to conflict with each other, we think it not proper to disregard the more recent expressions of Congressional intent contained in paragraph (3) of § 15a.

Moreover, we find scant basis of fact supporting the Commission's action even if its interpretation of the applicability of the "national defense" clause were correct. The pertinent evidence seems to be confined to: (1) a 1955 report of the U.S. Maritime Administration entitled "Review of the Coastwise and Intercoastal Shipping Trades." This report stresses the need for break-bulk capacity. Neither Seatrain nor Sea-Land now have such capacity. (2) S. Rep. 2494, 81st Cong., 2d Sess. (1950), which refers in passing to the importance of coastal shipping to the national defense. But the Senate Report is eleven years old, and does not seem to have resulted in legislation. Whatever its relevance in 1950, it must yield to the specifics of the 1958 Act. After all, so far as appears, compulsory rate differentials were not set up to protect the coastwise carriers at the expense of competing modes and the shipping public, from their tremendous loss of tonnage between 1940 and 1958. R. 27.

The Commission says that "shipper evidence * * * is indicative of a need by the general public for the services of these lines." R. 49. This statement assumes the matter for decision: since cost is a major factor, as long as the Commission maintains a rate differential shippers will "need" the lower-rate mode. Should the Commission heed the statute and allow the reductions, the "need" in evidence may well disappear.

The defendants' other arguments can be disposed of shortly.

The Commission indicates, and the government insists, that a full-fledged rate war is the inevitable consequence of allowing the proposed rate reduction. But surely, under its power to fix minimum rates, 49 U.S.C. § 15(1), the Commission will have power to disapprove rates not compensatory. Nothing in this opinion disparages that power.

Seatrain in its brief expresses fear that the proposed rates, if effective, would eliminate it as a competitor and suggests that the railroads might use its demise as an opportunity for rate increases. That bogie is laid at rest by 49 U.S.C. § 4(2). In other respects, the Seatrain position is largely that of Sealand and the government except that Seatrain produced no evidence from which its costs could be found.

R. 38.

The government further argues that the proposed rates were disallowed not because a differential was needed to protect the water carriers but because the railroads failed to sustain the burden of proof. Thus it says in its brief: "when the proponents of a lowered rate which will deprive another mode of needed traffic, indeed deprive it of any opportunity to compete, fails to establish that the proposed rates are not cost-justified in that they reflect inherent cost advantages, then the rate should not, and certainly need not, be allowed." Beyond doubt, in the situation here, the burden was upon the railroads, as propondents, to submit evidence from which their own costs for the 66 movements could be determined. Indeed, the Act, 49 U.S.C. § 15(7), provides that "the burden of proof shall be on the carrier [who seeks a rate-change] to show that the proposed changed rate * * * is just and reasonable." But where, as here, a rate-

change is protested because of its effect upon a competing mode by one who claims to have the inherent advantage of lower costs, it is for the protestant to show its costs. This was expressly recognized in the dissenting report herein and not disputed in the majority report. And in the report of the Commission in No. 32920 on "Various Commodities from or to Arkansas and Texas," decided June 22, 1961, this rule was expressly recognized.

Finally, the government urges that even if the Commission's order was improperly based on a belief that the water carrier traffic, notwithstanding § 15a(3), should be protected, it would be futile and fruitless for us to set aside the order because the same order would then be made upon another ground, viz., that the water carriers were in fact the low-cost mode. As we have shown, no adequate basis for such a ground of decision is disclosed in the present record. But even if in this we are wrong, we cannot say what disposition the Commission would make of the controversy if authoritatively advised that the rationale of the report now before us is erroneous. In that event, it would be for the Commission, not this court, to decide whether the record should be reopened for further evidence and to evaluate the evidence. *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80 at pp. 87, 88.

Accordingly, the order requiring cancellation of the TOFC rates is set aside, and the Commission is enjoined from cancellation of TOFC rates which return at least the fully-distributed cost of carriage.

If, however, on some enlarged record the Commission shall find that the water carriers are in general the low-cost mode, and if it shall also find that value-of-service considerations demand water carrier rates on particular movements and commodities which

each return to the water carriers more than their fully-distributed costs, our injunction will not go so far as to prevent the Commission from requiring that TOFC rates be set high enough to protect water carrier traffic; provided, however, a railroad rate for a particular movement, if it yields the railroad's fully-distributed cost which is lower than the water carrier's fully-distributed cost, may not be disturbed. It is noted that at least two of the rates involved in this proceeding were found to fall in this two-pronged category. See R. 35.

A decree in accordance with this opinion may be submitted by the plaintiffs, on notice unless consultation amongst the parties shall bring about a waiver of notice.

Appendix A.

The I.C.C. report speaks freely of "out-of-pocket" costs and of "fully-distributed" costs but gives no definition to the sense in which it uses these terms. Since an understanding of the I.C.C.'s cost techniques is necessary to an understanding of its decision, we state in this appendix our understanding of the I.C.C. cost technique as gleaned from the sources indicated.

The I.C.C. employs different techniques for estimating railroad and water-carrier costs, reflecting the differing characteristics of each mode.

Water-carrier costs are calculated by traditional accounting methods, since they are "largely associated with the individual accounting unit," *Meyer, Peck, Stenason & Zwick, Competition in the Transportation Industries*, 112 (1959)—i.e., the operations of a given ship or ships. The costs for component items—including steamships, trucks, stevedoring charges, port charges, interest and depreciation, the motor service charges at each end of the voyage, and overhead—are calculated for representative voyages. Costs per ton-

mile are computed by applying average figures for tonnage and mileage.

Costs are then broken down into two categories, (1) "out-of-pocket" and (2) "fully-distributed." "Out-of-pocket" costs represent a rough approximation of the long-run *marginal* (i.e., added) costs of carriage. Estimates are made of the degree to which each of the cost components mentioned above—steamships, trucks, stevedoring, etc.—varies with the volume of traffic carried. To arrive at a ton-mile figure, non-varying expenditures (those attributable to size of plant rather than intensity of use) such as billing, terminal supervision, garages, etc., are subtracted from total expenditures, and the remainder divided by ton-miles carried. See *Rationale of Cost Finding Section*, Hearing Examiner's Proposed Report, I. & S. Docket No. M-10415, Appendix B.

"Fully-distributed" costs, by contrast, represent an approximation of the total long-run costs of remaining in operation. To obtain fully-distributed cost, corporate overhead is first added to "full" operation cost, i.e., to all direct expenditures. Then, on the basis of a 95% "operating ratio," i.e., the ratio between direct expenditures plus overhead, and fully-distributed costs, an allowance for profit is calculated which amounts to about 5.3% (.0526+) of direct expenditures plus overhead. The fully-distributed cost is the sum of this profit, the overhead, and direct expenditures. This method is used by the I.C.C. whenever capital investment is low, so that a return figure based on such investment would not reflect the size of operations. Sea-Land pressed this form of calculation because its vessels are largely chartered and its motor service hired. In this, the I.C.C. acquiesced. See *Rationale of Cost Finding Section*, I. & S. Docket No. M-10415, *supra*.

Railroad cost figures cannot be developed so easily. The basic difficulty is in "multiple use"—the tracks, rolling stock, terminal expenses, and even the trains themselves, carry mixed shipments to different destinations. Apportionment of costs to the different services offered is a complex and difficult process. For example, assume a train already made up and ready to go. What is the marginal or *added* cost of tacking on two more flatcars? Or should these two cars bear some proportion of costs incurred before they were added, which indeed would have been fully incurred even if the cars had *not* been added?

For accounting purposes, the cars are regarded as bearing a proportionate share of total cost—in other words, the marginal cost of added shipments is in reality average cost of all shipments. Commonly, costs per unit of output—or variable costs—are calculated by a formula of the type $Y = a + bX$, where Y is the ratio of total operating expenses to miles of track; a is "threshold" cost of operation, non-fixed investment which nevertheless must be made in some minimum quantity when *any* amount of activity is undertaken (such as the pay of one secretary—you can't hire one half a secretary); b is cost per unit of output and X is the ratio of gross ton miles of traffic to total miles of track. From the above formula, the I.C.C. derives what it calls a "percent variable." This is an expression of the proportion of variable costs to total costs— $\frac{bX}{Y}$. *Meyer, et al., supra*, at 274.

To estimate the costs of a particular service, the following procedure is used. Some costs, such as right-of-way maintenance, are developed for the system as a whole, on a gross ton-mile basis, and this average then applied to the movements in question. Other costs, capable of direct observation—*e.g.*, use

of switch engines, special equipment—are then added, after application of the “percent variable” derived earlier. The result is the “out-of-pocket” cost of service. See, e.g., *Rationale of Cost Finding Section*, at R. 54 and following.

For our purpose, it is important to realize what kinds of railroad expenses are attributed to a service by the I.C.C. in calculating “out-of-pocket” costs. (These expenses are included by attribution whenever they are not susceptible of direct observation.) Total operating expense “includes all the labor, fuel, and miscellaneous variable costs associated with the operation of trains, yards, and stations; it also encompasses marketing, advertising, selling and promotion expenses under the catch-all heading of traffic expenses; even supervisory and legal expenses are included; furthermore, the major portion of capital consumption costs is found in the maintenance-of-way and structure and in maintenance-of-equipment accounts. In short, railroad operating expenses include virtually all important railroad costs except property taxes and interest payments.” *Meyer, et al., supra*, at 275. Furthermore, shares of these tax and interest payments, as well as a return figure, are then assigned to the particular traffic under investigation in order to calculate “out-of-pocket” costs. See R. 55.

“Fully-distributed” costs include, in addition to “out-of-pocket” costs: the non-varying portion of operating expenses (*b* in the formula); the remainder of taxes and interest; the remainder of capital costs; and a 4% return on investment. “Fully-distributed” costs of a particular service are then obtained by adding an aliquot share of the system’s fully-distributed cost components to the calculated “out-of-pocket” cost of the service. Cf. R. 55-56.

APPENDIX B

United States District Court, District of Connecticut

THE NEW YORK, NEW HAVEN AND HARTFORD RAIL-
ROAD COMPANY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COM-
MERCE COMMISSION, DEFENDANTS

SEA-LAND SERVICE, INC., AND SEATRAN LINES, INC.,
DEFENDANTS-INTERVENORS

Civil Action No. 8679

JUDGMENT

This cause having been heard on the plaintiffs' complaint seeking to enjoin, set aside, and annul a report and order of the Interstate Commerce Commission dated December 19, 1960 and the order dated February 3, 1961 in a proceeding styled *Commodities—Pan-Atlantic Steamship Corporation*, Investigation and Suspension Docket No. M-10415, which embraces a proceeding styled *Piggy-back Rates—Between East and Texas*, Investigation and Suspension Docket No. 6834, to the extent that such reports and orders found unlawful and unreasonable certain Trailer-on-Flatcar (TOFC) rates described more fully therein and included in Investigation and Suspension Docket No. 6834; and the parties appearing by counsel having been heard and the issues duly

tried; and the Court having concluded in its opinion that plaintiffs are entitled to judgment:

It is hereby Ordered, Adjudged and Decreed that the above described reports and orders of the Interstate Commerce Commission entered December 19, 1960 and February 3, 1961, to the extent that they found unlawful and unreasonable certain Trailer-on-Flatcar (TOFC) rates described more fully therein, be set aside and vacated in accordance with the opinion of this Court and that the Interstate Commerce Commission is hereby enjoined from enforcing them without prejudice to such further proceedings as the Commission may deem appropriate.

Issued at New Haven, Connecticut, this 8th day of January, 1962.

CARROLL C. HINCKS,

United States District Judge.

ROBERT P. ANDERSON,

United States District Judge.

WILLIAM H. TIMBERS,

United States District Judge.

APPENDIX C

Interstate Commerce Commission

Investigation and Suspension Docket No. M-10415¹

COMMODITIES—PAN-ATLANTIC STEAMSHIP CORPORATION

Decided December 19, 1960

1. In I. and S. Nos. 6906 and M-11375, and embraced proceedings, and upon reconsideration in I. and S. No. M-10415 and embraced proceedings, sea-land local and joint single-factor through rates on numerous commodities, in trailerload, multiple

¹ In addition to the above-entitled proceeding and 23 others embraced therewith, listed in footnote 1 of the prior report, 309 I.C.C. 587, which are here reconsidered, this report also embraces 19 other proceedings initially decided herein following oral hearing on 3 separate records, namely:

I. and S. Docket No. 6834, Piggyback Rates Between East and Texas, and the following embraced proceedings: No. 32313, Commodities, Pan-Atlantic, Between East and Texas, and fourth-section application No. 34227, Trailer-on-flatcar Service Between Official Territory and Dallas-Fort Worth, Tex.

I. and S. Docket No. 6906, Commodities Via Pan Atlantic Between Texas, Louisiana, and Florida, and embraced proceedings: I. and S. Docket No. 6918, Bags and Boxes from New Orleans, La., to Florida, I. and S. Docket No. M-11051, Clay and Rosin from South to East, I. and S. Docket No. M-11034, Canned Goods from Fort Pierce, Fla., to Brewster, N.Y., I. and S. Docket No. 6932, Petroleum Products from Baton Rouge to Miami, I. and S. Docket No. M-11264,

trailerload, and volume quantities, over single-line routes of Pan-Atlantic Steamship Corporation and joint-line routes of motor common carriers and Pan-Atlantic, from, to, and between numerous points in the East, on the one hand, and, on the other, points in the South and Southwest; also from and to points in the South, and between such points, on the one hand, and, on the other, points in the Southwest, found lawful, except as indicated in the report. Prior findings in I. and S. No. M-10415 and embraced proceedings, 309 I.C.C. 587, affirmed. The excepted rates ordered canceled.

2. In No. 32313, sea-land rates, except a rate of Pan-Atlantic, and rail-water-rail rates of Seatrain Lines, Inc., on numerous commodities over water-rail routes from origins in the East to Dallas and Fort Worth, Tex., found not shown to be unlawful. Unlawful rate ordered canceled.
3. In I. and S. No. 6834, proposed reduced trailer-on-flatcar rates on numerous commodities between points in official territory, one the one hand, and, on the other, Dallas and Fort Worth, found unjust and

Various Commodities, Pan-Atlantic Steamship Corporation, I. and S. Docket No. M-11259, Pan-Atlantic Steamship—Between East, South, and Southwest, I. and S. Docket No. M-11077, Commodities Via Pan-Atlantic from East to Florida, Louisiana, and Texas, and I. and S. Docket No. M-11361, Canned Goods from Fort Pierce, Fla., to New York, N.Y.

I. and S. Docket No. M-11375, Tires, Chemicals, and Paint Via Pan-Atlantic, and embraced proceedings: I. and S. Docket No. M-11387, Commodities in Motor-Water-Motor Service from New Jersey and Pennsylvania to Florida, Louisiana, and Texas, I. and S. Docket No. M-11465, Various Commodities from East to South and Southwest, I. and S. Docket No. 6962, Roofing from New Orleans to Tampa, I. and S. Docket No. M-11421, Iron or Steel Castings or Forgings from Houston, Tex., to Buffalo, N.Y., I. and S. Docket No. M-11436, Machinery from New Britain, Conn., to Lubbock, Tex., and I. and S. Docket No. M-11369, Aluminum and Junk from Mississippi and Alabama to the East.

unreasonable; and in the fourth-section application No. 34227, authority to establish and maintain the proposed trailer-on-flatcar rates without observing the long-and-short-haul provisions of section 4 of the Interstate Commerce Act, denied. Proposed schedules ordered canceled, without prejudice to the filing of new schedules in conformity with findings made.

4. Proceedings discontinued.

Appearances as shown in 309 I.C.C. 587, and in addition:

John P. Ganly for rail-carrier respondents in I. and S. No. 6834, applicants in fourth-section application No. 34227, and interveners in opposition in No. 32313.

A. J. Bordelon for protestant railroads in I. and S. No. 6906 and embraced proceedings, and Toll R. Ware for protestant railroads in I and S. No. M-11375 and embraced proceedings.

Ernest M. Sharp for the Houston Port Bureau, Inc., Arthur L. Winn, Jr., Samuel Moerman, and Walter J. Myskowski for the Port of New York Authority, James J. Fisher, Port Agent for the City of Providence, and Louis A. Schwartz for the New Orleans Traffic and Transportation Bureau, protestants in I. and S. No. 6834 and fourth-section application No. 34227, and interveners in support of a respondent in No. 32313.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

These proceedings are related and will be disposed of in one report. It was agreed by the parties that all of the evidence in Investigation and Suspension Docket No. M-10415 and proceedings embraced therein could be referred to in the other proceedings and, to the extent relevant, would be competent evidence therein. As indicated in footnote 1, 43 separate

proceedings are embraced herein. The title case and the 23 proceedings embraced therewith were the subject of a prior report, 309 I.C.C. 587, which is here being reconsidered. The other 19 proceedings were the subject of 3 separate reports proposed by the examiner in Investigation and Suspension Dockets Nos. M-11375, 6834, and 6906, and embraced proceedings.

Exceptions to the proposed reports and replies thereto were filed by the respondents and the protestants. The issues have been orally argued before us. Our conclusions differ in part from those proposed. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

The issues presented are the justness and reasonableness of several sets of rates² involving different modes of transportation; namely, (1) certain reduced so-called sea-land rates of the Pan-Atlantic Steamship Corporation³ (hereinafter called Pan-Atlantic) and the motor common carrier participants in its tariffs; (2) numerous rail water-rail rates of Seatrains Lines, Inc. (hereinafter called Seatrains) and (3) numerous proposed reduced rail trailer-on-flatcar rates, hereinafter called TOFC rates, which reflect substantial parity with the sea-land and Seatrains rates and which the railroads claim are necessary for them to compete for this traffic. The most important question before us here is whether, in attempting to meet the competition of Pan-Atlantic and Seatrains, the railroads may establish compensatory rates which are on a parity with the rates of those competitors, or whether the ratemaking provisions of the Interstate Commerce Act, interpreted in the light of the national

² Rates and costs are stated per 100 pounds, except as otherwise indicated.

³ Name changed to Sea-Land Service, Incorporated, on April 1, 1960.

transportation policy, under the facts here presented, require that the rail rates on this traffic be maintained differentially higher than the rates of those competing modes.

The prior report in I. and S. Docket No. M-10415 and embraced proceedings set forth the history and description of the sea-land service of Pan-Atlantic, its advantages and disadvantages, rationale of the cost evidence, and other background material. A clear understanding of the related issues in these proceedings requires first a summarization of this evidence, after which we shall direct our attention to the issues and contentions of the parties in these proceedings.

The sea-land service of Pan-Atlantic in conjunction with certificated motor carriers, and by the use of its own motor equipment, moves merchandise freight in highway containers over motor-water-motor routes between the East, on the one hand, and the South and Southwest, on the other, and also between the Southwest and the South. The freight is moved from the shippers' docks over the highways in demountable highway containers to the port and thence lifted onto Pan-Atlantic ships for movement to the destination ports. At the destination ports the containers, with the freight intact, are lifted off the ships and onto highway trailers for delivery to the consignees' docks. This service is closely akin to railroad trailer-on-flat-car service with the substitution of the deck or the hold of a vessel for the rail flatcar.

Prior to the institution of sea-land service, Pan-Atlantic engaged in break-bulk water service, which also provided joint routes with motor common carriers and door-to-door service from consignor to consignee. In the prior break-bulk service longshoremen handled the lading into and out of the ships, whereas in sea-land service the containers with the lading are lifted

on and off the ships by the use of two gantry-type cranes on each vessel. Each crane is capable of unloading one trailer and placing another on board ship in about 5 minutes. These patented cranes are part of the ships, and eliminate the need for costly shore installations. The cranes make it possible to serve any port having adequate water and dockside aprons large enough to permit bringing a truck chassis alongside the vessels. Compared with the slower and more expensive break-bulk service, sea-land has reduced considerably Pan-Atlantic's costs, the cargo-handling time, the import vessel time, and its loss, damage, and pilferage expenses.

Whether the containers are loaded or empty, a full complement of 226 containers is carried on each voyage. To achieve the proper balance of the cargo, it is necessary that there be a systemized sequence of loading the trailer bodies. For this purpose, many of the outbound containers are assembled at a parking lot near the port at least 60 hours in advance of the vessel's arrival, and the bulk of the cargo must be delivered to shipside parking lots at least 12 hours before the arrival of the ship. The proper sequence of loading affects the trim of the vessel, the list of the vessel during and upon completion of loading, and degree of roll and stability. In addition, certain types of containers must be stowed in a limited number of positions only, depending upon the weight, the container construction, the cargo carried, and the destination. One truck breakdown en route to the parking lot from a pickup point could destroy the entire planned loading sequence for any one hatch. Generally, Pan-Atlantic cannot accept sea-land freight and load it on a ship the same day.

Both single-line and joint-line sea-land services are provided by Pan-Atlantic. It operates single line be-

tween ports and port terminal areas which it is authorized to serve, by use of its trailerships on the water and leased tractors and trailers on the land. In some instances Pan-Atlantic has operated single line as far as 60 miles beyond a port; its performance of such extensive "terminal" service was found to be without appropriate authority in *Central Truck Lines, Inc. v. Pan-Atlantic S.S. Corp.*, 82 M.C.C. 395.

The joint-line sea-land service of Pan-Atlantic extends well beyond the ports and port terminal areas. For example, electrical appliances may move joint-line motor-water-motor, from Somersworth, N.H., via the ports of New York (Port Newark, N.J.) and Houston to Dallas, Tex.

Presently, Pan-Atlantic is a wholly owned subsidiary of McLean Industries, Inc. The total investment in the new type sea-land operations made by McLean, or its subsidiaries or affiliates, aggregates between \$40 and \$45 million, of which about 50 percent was used for conversion of break-bulk type vessels to sea-land vessels, over \$20 million for automotive equipment, and about \$500,000 for procurement of terminal facilities, including docks, piers, staging areas, and warehouses.

Beginning in 1933, Pan-Atlantic operated as a conventional break-bulk carrier, except during the World War II years. In May 1957, it suspended its Atlantic-Gulf coastwise break-bulk service to provide vessels for conversion into trailerships. For its sea-land service in the Atlantic-Gulf coastwise trade, it converted four vessels into trailerships, each with a capacity of 4,000 tons of payload freight, and each holding 226 containers, of which 166 are stowed below deck and 60 on deck. The ships are 468 feet long and capable of a speed of about 15.5 knots, substantially

the same as when the ships were used in the break-bulk service.

Prior to World War II there were about 19 deep-water common carriers operating in the Atlantic-Gulf coastwise trade, employing about 139 vessels. In 1940, these water carriers transported more than 8,500,000 tons of cargo. Today, only two carriers are in this trade; namely, Seatrain and Pan-Atlantic, operating, respectively, six and four vessels. A comparison made by Pan-Atlantic shows that, between 1939 and 1956, inclusive, the tonnage handled by class I railroads in the United States increased 160.5 percent, and the tonnage handled by class I motor carriers increased 545.6 percent. Excluding bulk oil carried by Seatrain and Pan-Atlantic, the tonnage handled by water carriers in the Atlantic-Gulf coastwise trade during that period declined 79 percent.

Since World War II there has been a substantial expansion of commerce in the United States, particularly in the South and Southwest. An exception to the general growth of transportation has been the Atlantic-Gulf coastwise dry-cargo tonnage of the water service. Pan-Atlantic estimates that Seatrain operating at full capacity could transport about 1 million net tons annually, and that Pan-Atlantic could transport about 800,000 net tons per year (100 round-trip voyages with full loads of 4,000 tons in each direction). The total for the two water carriers would thus be 1,800,000 net tons, compared with over 8,500,000 net tons transported prewar by the water carriers in the same trade. Excluding bulk petroleum carried in tankers, Pan-Atlantic carried in excess of 1 million tons in its coastwise break-bulk service in 1950. In 1956 and 1957, it carried in coastwise service only 433,915 and 332,057 tons, respectively.

Traditionally, water rates, including water-rail and water-motor rates, have been maintained at levels differentially lower than the corresponding all-rail rates, principally because of disadvantages in the water service due to perils of the sea, slower transit time, and infrequency of sailings. The last major proceeding in which the rates of the Atlantic-Gulf coastwise water carriers were considered was *Class Rate Investigation, 1939*, 286 I.C.C. 5 (docket No. 28300—1952). Therein, we prescribed reasonable maximum first-class rates on ocean-rail traffic, and also reasonable percentage relations of the lower classes to first class, between North Atlantic ports and interior points in eastern seaboard territory, on the one hand, and, on the other, New Orleans and Baton Rouge, La., Texas-Gulf ports, and interior points in the Southwest. Those class rates were designed to preserve the then existing differentials of the ocean-rail rates under the all-rail rates.

The prescribed rates in No. 28300 were class rates, whereas in the instant proceedings only commodity rates are in issue. When it inaugurated the sea-land service, Pan-Atlantic evaluated the rate structures of the existing water and overland carriers and concluded that its sea-land service needed rate differentials under all-rail rates, but that lesser differentials would suffice than those maintained under its previous break-bulk service.

For its trailership service, Pan-Atlantic first put into effect class rates, and later commodity rates. Generally the class rates were protested, but were not suspended and became effective. Many of the commodity rates were suspended and are under investigation in these and other proceedings. The class-rate structure established by Pan-Atlantic varies depending upon origins and destinations, the direction of the

competing rail ratemaking routes, the constructive water mileages, and the prescribed ~~maximum ocean~~ rail rates, among other factors. Generally, its trailership class rates are on the basis of 92.5 percent of the overland-carrier rates on terminal (port) to terminal (port) traffic, and on the basis of 95 percent of the overland rates on traffic moving from, to, or between interior points located beyond the terminals (ports).

The commodity rates for its trailership service in general were related percentagewise to the all-rail commodity rates in the same measure as the sea-land class rates are related to the all-rail class rates. As there are exceptions to the 92.5-95 percent formula in the class-rate structure, so also there are numerous exceptions to that formula for commodity rates. Individual adjustments are made in the latter rates because of varying competition with all-rail carriers, all-motor common carriers, Seatrain, a barge line, and exempt motor carriers. Also, there are instances where the sea-land rates were designed to preserve competitive relations between shippers located at different origins. The result is a wide fluctuation in the differentials between the sea-land rates and the all-rail commodity rates.

Pan-Atlantic contends that the primary accomplishment of its sea-land trailership service lies in the reduction of its internal operating expenses, rather than in any substantial improvement in the value of its service to the public. The expenses in the present sea-land trailership operation are from \$10 to \$12 per cargo ton less than those incurred in the previous break-bulk type operation. This reduction in expense is mainly a result of the reduction in cargo-handling time and in port vessel time. On the other hand, the rail and motor carriers generally contend that there has been a substantial

change in the character of Pan-Atlantic's service from the old break-bulk service to the new trailership service, and particularly in its value to the shipping public. Pan-Atlantic's own literature and public advertisements represent that its trailership service will save transportation costs, avoid delays, prevent damage, and accomplish a reduction in loss, damage, and pilferage.

The views of the shippers on the comparative value of sea-land service to rail service were many and varied, according to their individual transportation problems. Door-to-door service is an important consideration to many shippers. In sea-land service, the lading often moves in a sealed trailer from the door of the consignor to the door of the consignee without being handled en route. Where a shipper or consignee does not have a private or assigned rail siding, the sea-land service has a distinct advantage over rail service, the same as all-motor service. Thus, some New York City consignees do not have private or assigned sidings, which makes drayage necessary when using all-rail service. A survey made by Pan-Atlantic showed that out of 2,350 of its potential shippers and consignees, 1,805, or about 77 percent, had private rail sidings, while 545 were either not located on rail sidings or were served by team tracks.

Among other factors considered by the shippers in determining the value of the respective services are time in transit, frequency of service, costs of loading and unloading, cost of blocking, dunnage, and bracing, loss or damage, and the availability of stop-off privileges. The testimony of the shippers on these value-of-service factors is recounted in detail in the prior report. Generally, their testimony was inconclusive and failed to show whether the water carriers' service or the rail carriers' service is more

valuable to the shippers by reason of these compared factors.

The most important, and usually the determinative, factor to the shippers as a whole is the measure of the rates. Most of the shippers would not use sea-land service at rates equal to or higher than all-rail or all-motor rates. A number of shippers also would not use sea-land service at rates higher than those of Seatrain. Some shippers who would not use sea-land service if Pan-Atlantic's rates were equal to the rail rates, also would not offer any of their traffic now moving by sea-land service to the railroads if the rail rates are maintained at the present differentials over sea-land rates. Certain other shippers would not use all-rail service even at differentials under all-motor or sea-land rates. Price competition in the sale of some commodities is so keen that the shippers thereof cannot pay a transportation premium for one mode of service as against another.

As indicated, the proceedings herein were heard on four separate records under the lead docket numbers, I. and S. Dockets Nos. M-10415, 6834, 6906, and M-11375, and for convenience of further discussion the other pertinent facts and contentions of the parties are hereinafter discussed under those respective numbers.

The reduced sea-land rates of Pan-Atlantic and the rail-water-rail rates of Seatrain here under investigation have become effective; the effective date of the proposed reduced T.O.F.C. rates has been voluntarily postponed by the rail carriers. For convenience, the rates under investigation will sometimes be referred to as the proposed rates.

I. AND S. DOCKET NO. M-10415

In the prior report in these proceedings, division 3 considered the lawfulness of approximately 469 proposed reduced commodity rates of Pan-Atlantic and the motor common carrier participants in its tariffs for the transportation in sea-land service of numerous commodities in trailerload, multiple trailerload, and volume quantities from, to, and between numerous points in the East, South, and Southwest.

Generally, the proposed sea-land rates are lower than the all-rail boxcar rates. In a few instances, for example where there are several rates and minima on a commodity, the all-rail rates are lower than the proposed sea-land rates at the higher minima. Certain of the proposed sea-land rates are listed in appendix A to the prior report, together with the sea-land costs and corresponding all-rail rates and costs. The sea-land costs are broken down between the Pan-Atlantic portion and the motor-carrier portion. Also shown in that appendix are representative examples of the ratios of the sea-land rates to the sea-land costs, and the ratios of the sea-land costs to all-rail costs. The costs shown in that appendix are those obtained from a restatement of the sea-land costs by our cost finding section. The detailed rationale of the restatement is found in appendix B to the prior report.

Of the 489 rates listed, including 20 rates canceled under special permission, 13 failed to yield out-of-pocket cost, and 145, or about 30 percent, failed to yield fully distributed cost. In the circumstances presented, division 3 concluded that a lawful rate need not necessarily yield fully distributed cost. Some of the sea-land rates are more than double the out-of-pocket costs and nearly double the fully distributed costs. Other sea-land rates exceed the

costs by narrower margins. Of the 13 rates which failed to cover out-of-pocket costs, 2 were canceled under special permission.

In the prior report, division 3 found the proposed reduced sea-land rates of Pan-Atlantic not unlawful, except 11 rates on the commodities and from and to the points shown in the footnote below, which failed to cover out-of-pocket costs. The latter rates were found not shown to be just and reasonable, and ordered canceled.

Upon petition of the railroad protestants, to which the respondents replied, we reopened the proceedings for reconsideration on the present record. The rail protestants do not seek reversal of the prior finding that, with the exceptions noted, the proposed sea-land rates are not unlawful. They do not question that finding. Their request for reconsideration is based upon the ground that the division strongly inferred in its report that in its consideration of any future rail-rate adjustments on this traffic, it would disapprove rail rates that would eliminate rate differentials in favor of sea-land. The protestants admit that no differentials or rate relationships which would prevent the adjustment of rail rates in the future were prescribed, but they object to the following paragraph on page 606 of the prior report:

There is indication that if the proposed rates are approved, the all-rail carriers intend to counter with reduced rates of their own. In

* Shipping carriers (empty barrels and bottles) from Daytona Beach, Fla., to Philadelphia, Pa.; canned goods from New Orleans, La., to Baltimore, Md., and Rochester, N.Y., from Gulfport, Miss., to Philadelphia, and from St. Francesville, La., to Miami, Fla.; pulpboard from Bogalusa, La., to New York, N.Y., and from Kreole, Miss., to New York and New Brunswick and Wharton, N.J.; and synthetic plastics from Baton Rouge, La., to Baltimore and Rome, N.Y.

such event, they should take into account the effect thereof upon the national transportation system and the implications of the national transportation policy, consideration of which is required by the established rules of ratemaking.

The railroads also object to the conclusion on page 605 that "the evidence indicates that the sea-land service generally must have rates lower than those by rail in order to attract any substantial volume of this traffic." They argue that this conclusion rests solely upon the unsupported belief that sea-land is an inferior service and that it must be protected from the price competition of the railroads. These protestants request that the report be so modified as to make clear that the approval of any of the sea-land rates does not constitute a prescription or approval of differentials in favor of sea-land rates compared with rail boxcar rates.

The prior report is criticized also by the railroads for its failure to adopt the examiner's conclusion that, comparing the rail boxcar service with the sea-land service, the cost studies indicate that the railroads are generally the lower cost agency. In this connection, the division, while accepting the cost finding section's restated costs, stated at page 605:

We do not have before us either the rail or sea-land costs as to many of these rates, and there is a complete absence of any all-motor costs. Moreover, as above discussed, other considerations enter into the factor of inherent advantages. For these reasons, we cannot determine on this record where the inherent advantages may lie as to each commodity, and still less as to each particular rate.

The foregoing conclusion of the division was based primarily on the fact that the all-rail costs submitted by the railroads dealt with 268 movements whereas

469 sea-land rates are involved. Either rail class or commodity rates are published from and to all of these points.

The ultimate conclusion of the cost finding section as to the lower cost agency was included in the examiner's proposed report, but was omitted in the division's report. The parties stipulated that the several cost studies could be referred to the cost finding section for analysis. Since that section has been cast in the role of an expert witness, its conclusion in the analysis should have been included in the report. That conclusion is that a comparison of the sea-land costs with the all-rail costs of record shows that, for most of the movements where rail costs are shown, the sea-land costs exceed the all-rail costs of boxcar service, and that this latter relationship is more pronounced at high minimum weights. We have considered the cost finding section's conclusion along with other facts of record in reaching our conclusion herein.

Our disposition of the other arguments and contentions in the rail carriers' petition for reconsideration is reflected in the findings hereinafter made.

I. AND S. DOCKET NO. 6834

By schedules filed to become effective on November 14, 1957, and later, in I. and S. Docket No. 6834, the rail-carrier respondents proposed to establish new reduced rates listed in 27 tariff items on numerous commodities in TOFC service between^a points in the

^a With one exception, the proposed rates are southbound from points in the East to Dallas and Fort Worth. There is one northbound rate on bags, cotton, new or old, from Dallas and Fort Worth to Baltimore, Md. This northbound rate also applies from and to other points taking the same rates, as provided in the tariff.

East, on the one hand, and, on the other, Dallas and Fort Worth. Upon protests thereto, the operation of the schedules was suspended to and including June 13, 1958. The effective date of the schedules has been postponed voluntarily by the respondents.

In fourth-section application No. 34227, the respondent rail carriers seek authority to establish and maintain the above-mentioned TOFC rates without observing the long-and-short-haul provisions of section 4 of the act. The carriers propose to continue to maintain certain higher rates to and from intermediate origins and destinations. The proposed rates and the application for fourth-section relief in connection therewith are opposed by the Secretary of Agriculture of the United States, Pan-Atlantic, Seatrains, The Eastern Central Motor Carriers Association, Inc. (hereinafter called Eastern Central), the Houston Port Bureau, Inc., the Port of New York Authority, the city of Providence, and the New Orleans Traffic and Transportation Bureau. No shippers or receivers located at the intermediate points oppose the granting of fourth-section relief.

In No. 32313, by order dated November 8, 1957, an investigation was instituted into effective rates of Pan-Atlantic listed in 22 tariff items in connection with its sea-land service on numerous commodities from origins in the East to Dallas and Fort Worth. By first supplemental order dated December 18, 1957, the investigation was broadened to include certain effective rates of Seatrains in connection with its rail-water-rail service from eastern origins to Dallas and Fort Worth. The sea-land and Seatrains rates are opposed by the rail carriers and by Eastern Central.

The proposed TOFC rates are on a parity with the present sea-land rates, and are substantially the same as the Seatrains rates. Since the railroads are

parties to the Seatrain rates to the extent that such rates apply from inland points, technically the railroads are respondents in No. 32313, but they are not defending the Seatrain rates.

The background of the TOFC and other rates.—The railroads published the proposed TOFC rates on a parity with the current rates for the sea-land service upon the assumption that these two operations, which have many of the characteristics of overland motor-carrier service, are equivalents from a quality standpoint, and that therefore, in the absence of special circumstances, they should be priced at the same level. Generally, as stated, Pan-Atlantic and Seatrain contend that the water-carrier services are entitled to rates differentially lower than the rates of the overland carriers. Eastern Central takes the position that TOFC rates generally should be continued on the level of the motor common carrier rates, and that if TOFC rates are reduced the motor-carrier rates also will have to be reduced. It urges that the railroads in their proposed TOFC service may not find it necessary to meet the exact Pan-Atlantic rates, and that the record may warrant a differential of the Pan-Atlantic rates under the TOFC rates, which it believes, however, should be less than the differentials presently maintained.

Rail TOFC service between points in the Southwest and points in the western part of official territory, including Pittsburgh, Pa., was inaugurated on June 13, 1956. Later, on September 8, 1956, the official-territory origins were extended to include points east of Pittsburgh. For this service, rates were published generally on a parity with the prevailing motor-carrier rates. When Pan-Atlantic inaugurated its sea-land service between the Southwest and the East in the fall of 1957, the railroads were

convinced that they could not compete without a reduction in their TOFC rates. They decided to publish TOFC rates on the same level as the sea-land rates, but not between all origins and destinations. It was their intention to publish the TOFC rates herein from selected points in official territory to Dallas and Fort Worth as a limited pilot or trial effort to meet the sea-land rates. A wholesale reduction in the TOFC rates would have disturbed competitive patterns between the railroads and the motor common carriers, and also would have created competition among the rail services, because the TOFC rates on the sea-land basis in many instances would have been lower than the all-rail boxcar rates.

Since the proposed TOFC rates were made applicable only to the destinations of Dallas and Fort Worth, they would result in fourth-section departures. Avoidance of these departures would have entailed substantial reductions in rail revenues at intermediate points well outside the sphere affected by the sea-land competition. There is such competition at Dallas and Fort Worth.

The general rate situation among the various carriers herein is illustrated by the rates on candy and confectionery. For example, from Naugatuck, Conn., to Dallas and Fort Worth, the sea-land rate is 207 cents, minimum 36,000 pounds, and this is also the proposed TOFC rate. The Seatrail rate from and to the same points is 208.25 cents, minimum 65,000 pounds. The present all-rail boxcar rate is 220 cents, minimum 36,000 pounds, and the corresponding all-truck rate in effect prior to December 9, 1957, was 284 cents, minimum 23,000 pounds.

The proposed TOFC rates, in reflecting parity with sea-land rates, at times go below the Seatrail rates. The sea-land rates are not always the same as the

Seatrain rates, and there are differences also in the minimum weights. In part, the differences between Seatrain and sea-land rates are caused by the variations in the application of general increases on the single-factor sea-land commodity rates and on the combination rail-water-rail Seatrain rates. Where the Seatrain rates are competitive with the rates of the overland carriers, it is the intention of Pan-Atlantic to eliminate minor differences between its rates and the rates of Seatrain by adjusting the sea-land rates to the level of the Seatrain rates. In those instances where Pan-Atlantic does not consider the Seatrain rates to be competitive with the rates of the overland carriers, it intends to maintain differentials so that the sea-land rates will be about 5 percent under the overland competitive rates.

Sea-land and TOFC costs.—Extensive cost evidence was submitted by the rail carriers and by Pan-Atlantic, and, as requested by the parties, this evidence has also been considered by our cost finding section, which has restated the TOFC costs and the sea-land costs. Representative rates, restated costs, and cost ratios are shown in appendix A hereto. The rationale of the restatement of the TOFC costs appears in appendix B. The rationale of the restatement of the sea-land costs is the same as that used in connection with I. and S. Docket No. M-10415, and others (appendix B of the report therein), and will not be repeated here.

The sea-land rates.—The sea-land rates, with one exception, exceed the restated out-of-pocket cost of performing the service, and they range as high as 258 percent of the out-of-pocket cost. The one exception is the rate of 216 cents, minimum 20,000 pounds, on paint and paint materials, from Baltimore to Dallas and Fort Worth, for which the restated out-of-pocket

sea-land cost is 217 cents, or 1 cent more than the rate. There is no corresponding proposed TOFC rate, minimum 20,000 pounds. There are under investigation herein both a sea-land and a proposed TOFC rate on paint and certain other commodities from Baltimore of 187 cents, minimum 36,000 pounds, which rate exceeds the out-of-pocket costs by sea-land and by TOFC. Most of the sea-land rates herein also exceed fully distributed costs.

The restated sea-land costs, both out-of-pocket and fully distributed, are below the restated TOFC costs for all movements of comparable weight as computed for railroad-owned flatcars having a capacity of a single trailer and equipped with tiedown devices. In connection with flatcars not presently owned but leased by the railroads, designed to hold two trailers with special holddown devices (hereinafter called T.T.X. cars), the restated sea-land costs are below the restated TOFC costs for all except 2 of the 66 movements listed in the restatement. We conclude that, generally, for the movements herein, the costs of record indicate that sea-land is a lower cost service than TOFC.

After inauguration of Pan-Atlantic trailership service to and from Houston, Tex., in October 1957, shipments were made in 1957 in connection with only 13 of the 22 Pan-Atlantic tariff items under investigation herein; and only 15 shipments moved under 7 of those 13 items. The record does not disclose the amount of traffic handled at rates in the other 6 active items, but on the whole the amount of traffic handled in sea-land service at rates in these 22 items in 1957 after inauguration of the service in October apparently was relatively small. There is no indication that Pan-Atlantic has moved any traffic at rates as high as competing all-rail boxcar or TOFC rates.

The proposed TOFC rates.—As shown in the re-statement of costs by our cost finding section, the proposed TOFC rates equal or exceed the restated out-of-pocket TOFC costs computed for hauls with so-called average circuitry (the shortline distance between the origin and the Chicago and East St. Louis, Ill., gateways and between these gateways and the destination, increased by 13 percent as an allowance for average circuitry); for all listed movements by T.T.X. cars; and for all but 6 of 66 listed movements by railroad-owned cars. The proposed TOFC rates equal or exceed the fully distributed costs for 43 movements by T.T.X. cars and for 14 movements by railroad-owned cars. More trailers per car are carried on T.T.X. cars than on railroad-owned cars.

The six movements in railroad-owned cars which do not return out-of-pocket costs are electric switch boxes from Newark, N.J. (rate 240 cents, minimum 24,000 pounds, restated out-of-pocket cost 249 cents); food-stuffs from New York, N.Y. (rate 222 cents, minimum 24,000 pounds, out-of-pocket cost 249 cents); laundry sour from Baltimore (rate 169 cents, minimum 36,000 pounds, out-of-pocket cost 172 cents; and rate 195 cents, minimum 24,000 pounds, out-of-pocket cost 236 cents); alcoholic liquors from Baltimore (rate 267 cents, minimum 20,000 pounds, out-of-pocket cost 276 cents); and alcoholic liquors from Philadelphia (rate 280 cents, minimum 20,000 pounds, out-of-pocket cost 283 cents). As we have no way of knowing the percentages of this traffic which would move in railroad-owned cars and in T.T.X. cars, we conclude that the rates for these six movements are not shown to be compensatory.

The Seatrain rates.—The investigation herein of Seatrain rates is limited to those on three groups of commodities, briefly described as linoleum, ammuni-

tion, and candy and confectionery. The first commodity group is more generally described as floor coverings or related articles, including carpets, mats, rugs, coverings, and linoleum. The instant rates on linoleum range from 35.5 to 40.6 percent of the No. 28300 first-class rail-water-rail rates. In *William Volker & Co. of Texas, Inc., v. Central R. Co. of Pa.*, 302 I.C.C. 757, the complainants assailed the combination rates on linoleum transported over rail-water or rail-water-rail routes, including rates from and to the origins herein. The assailed rates comprised in most instances the aggregates of intermediate rates, consisting in part of exceptions or commodity-rate factors. These rates produced higher charges than did rates established on the uniform classification basis. We found that for the future those assailed rates were unjust and unreasonable to the extent that they exceeded the contemporaneous uniform classification basis. Rates in conformity with that order, on the basis of 35 percent of first class, were published effective May 15, 1958. These rates, now in effect, are on a basis lower than that reflected by the Seatrains rates on linoleum under investigation herein. Accordingly, this phase of the investigation of Seatrains rates will not be further discussed.

The rates of Seatrains on ammunition here under investigation apply from Edgewater, N.J., to Dallas and Fort Worth on traffic originating at Bridgeport and New Haven, Conn. These proportional rates, when added to the all-rail factors from origin to Edgewater, produce combination rail-water-rail rates to Dallas and Fort Worth of 295 and 300 cents, respectively, minimum 40,000 pounds. These commodity rates alternate with higher rates, minimum 30,000 pounds, not here under investigation, which are based on classification exceptions. The Seatrains

commodity combination rates, minimum 40,000 pounds, are related to the corresponding all-rail commodity rates^a by lesser differentials than are the Seatrain exceptions class rates to the corresponding all-rail exceptions class rates. The differential of 70 cents per 100 pounds of the rail-water-rail 30,000-pound rates under the corresponding all-rail rates results from the (exceptions) class rates prescribed or approved in docket No. 13535. The commodity combinations, minimum 40,000 pounds, reflect differentials of 39 cents or 56 percent, and 34 cents or 49 percent, respectively, from Bridgeport and New Haven, of the class-rate differential.

During 1957, Seatrain obtained a total of three carloads of ammunition from Bridgeport to Dallas and Fort Worth, and no movement from New Haven. One of the three shipments moved at the 30,000-pound rate and the other two at the 40,000-pound rate. Under the existing rates, Seatrain participated in only a small portion of the ammunition traffic. Obviously, if the ammunition differentials were replaced by rate equalization, Seatrain's competitive position would be weakened considerably.

The rates of Seatrain on candy and confectionery here considered are from Edgewater to Texas City, Tex., on shipments coming from specified origins in Connecticut, Massachusetts, New Jersey, New York, and Pennsylvania. These proportional rates, when added to the all-rail factors to and from the ports, produce combination rates subject to minimum weights of 50,000 and 65,000 pounds which alternate with certain class rates, minimum 36,000 pounds.

The existing all-rail rates on candy and confectionery are exceptions class rates, minimum 36,000

^a Reference to all-rail rates means to existing all-rail rates, and does not refer to the proposed TOFC rates.

pounds. They are lower than the rail-water-rail class rates, minimum 36,000 pounds, and also lower than some of the Seatrain commodity combination rates, minimum 50,000 pounds. The Seatrain commodity combination rates, minimum 65,000 pounds, are lower than the existing all-rail exceptions class rates, minimum 36,000 pounds, by 5 cents at Camden, N.J., and Philadelphia, Pa., by 9 cents at Boston, Cambridge, Malden, Mansfield, and Milton, Mass., and Reading, Pa., by 11 cents at Naugatuck, and by 12 cents at Brooklyn, N.Y.

Of the 14 origins for candy herein, in 1957 Seatrain obtained only a total of 4 carloads, each over 65,000 pounds, from Mansfield. Thus, Seatrain participated in only a very small portion of the candy traffic. Obviously, if the candy differentials favorable to Seatrain were replaced by rate equalization, its competitive position would worsen considerably.

Seatrain costs.—No evidence was introduced by Seatrain or by any of the other parties herein concerning the cost of the Seatrain service or the compensatory nature of its rates. While it was agreed that the annual reports of all parties might be referred to, and materials therefrom used without proof of authenticity, subject to objections as to relevancy and materiality only, no specific reference to the Seatrain reports was made at the hearing. On brief, Seatrain states that data embodied in its annual reports clearly show the compensatory nature of its rates under investigation herein. We conclude that the evidence does not warrant a finding that the Seatrain rates are noncompensatory.

The comparative values of the TOFC, sea-land, and Seatrain services.—From the standpoint of the shipper, the TOFC service and the sea-land service

are similar in that both provide door-to-door motor-carrier service; that is, the shipment leaves the consignor in a motor-carrier trailer and arrives at the door of the consignee in the same motor-carrier trailer. In TOFC service, the trailer is moved on railroad flatcars, and in sea-land service the trailer body or box is moved on a trailership during the course of the line-haul movement.

Seatrain service is similar to all-rail boxcar service in that the service offers to the shipper the transportation of his lading in a rail car from consignor to consignee. To the extent that all-rail service has certain service disadvantages, such as in the case of a shipper not located on a private siding, these disadvantages also generally beset the Seatrain service. Seatrain at present offers service between the ports of Edgewater, on the one hand, and, on the other, Belle Chasse, La., and Texas City, using freight cars as containers. Seatrain contemplates the inauguration of a new so-called "seamobile" service, which is to be similar to Pan-Atlantic's sea-land service. Seamobile would use special containers which would be transferred readily between Seatrain vessels and highway trailers or rail cars.

The rail carriers regard Seatrain as offering a lower quality service than TOFC, and TOFC service as generally of higher quality than all-rail boxcar service. According to them, there is no indication that Seatrain service is of lower quality than all-rail boxcar service.

Generally, all of the parties agree that TOFC is a higher quality service than all-rail boxcar service. A number of shipper witnesses presented by Pan-Atlantic stated that they would not use sea-land service at rates equal to or higher than the all-rail rates. Although this testimony dealt primarily with a com-

parison of sea-land with rail boxcar service, inasmuch as TOFC is of higher quality than all-rail boxcar service, it follows that the testimony has application also to a comparison of sea-land with TOFC service.

On the other hand, a number of shipper witnesses presented by the rail carriers made statements to the effect that they would not use TOFC service unless the railroads offered piggyback rates equal to sea-land rates. Some of these shippers would not use carload boxcar service because their customers are not located on rail sidings, whereas sea-land service provided store-door delivery, and these shippers indicate that the railroads must provide TOFC service to compete with the sea-land service. One of these shipper witnesses stated that transit time has never been an important factor to it. Other shippers are concerned with transit time, and state that between certain points not in issue herein sea-land service has been faster than all-rail boxcar service.

Slower transit time is listed by Pan-Atlantic as one of its service disadvantages in relation to the proposed TOFC service. On four voyages during November and December 1957, the average transit time by sea-land was 13.98 days from eastern origins to Dallas and Fort Worth, and a study made by the rail carriers for all-rail boxcar service showed an average transit time of 10 days from New England to the Southwest and 9 days from trunkline territory to the Southwest. Generally, so far as this record shows, TOFC service has about the same or 1 day faster transit time than all-rail boxcar service. For cost purposes, the rail carriers and Pan-Atlantic used TOFC costs for trailer rental based on average round-trip times, respectively, of 13.4 days and 14 days. We conclude that the average one-way TOFC transit time from origin to destination is about 7 days, and that

sea-land service is generally slower than TOFC service.

Seatrain lists the same general disadvantages of its service in relation to the proposed TOFC service as were listed by Pan-Atlantic. Seatrain has two weekly sailings from Edgewater to Texas City, and two weekly sailings in the reverse direction. Seatrain time in transit by water between these ports is 6 days one way, and to this time there must be added from 3 to 5 days for the movements from New England or trunkline territory to Edgewater, and 2 days for the movement from Texas City to Dallas or Fort Worth. Seatrain transit time is slower than the proposed TOFC service. Seatrain also lists restrictions on the size of cars which its vessels are designed to handle, and the bunching of cars at destination when shipped via Seatrain to a multiple-car consignee, as additional service disadvantages. As stated, it is conceded by the parties that Seatrain offers a lower quality service than TOFC.

Generally, the rail carriers consider sea-land service to be superior to the Seatrain service. Pan-Atlantic contends that the railroad position is influenced by the fact that some of the railroads participate in the joint rail-water-rail operations of Seatrain, and that the railroads hope to make sea-land rates non-competitive with Seatrain, thus forcing Pan-Atlantic out of the Atlantic-Gulf trade. It states that many of the Seatrain rates are maximum rates prescribed for application by Seatrain in No. 28300, and that such rates cannot be condemned for application by Seatrain in the same manner that the railroads are seeking to have them condemned for application via Pan-Atlantic.

Seatrain takes the position that there is nothing of record to justify sea-land rates lower than Seatrain

rail-water-rail rates, and that sea-land truck-water-truck rates which are lower than Seatrain rates, either in the measure of the rate or by virtue of lower minimum weights, or both, are unjust, unreasonable, lower than competitively necessary, and therefore injurious to the rate structure and contrary to the national transportation policy. It asks that Pan-Atlantic be ordered to publish and maintain rates and minimum weights no lower than those maintained by and for the account of Seatrain in its rail-water-rail service.

The evidence shows that sea-land and Seatrain services, insofar as the water transportation is concerned, are substantially similar. Both transport cargo in containers on ocean vessels, in one case truck trailers and in the other, rail freight cars. In both, marine insurance is provided by the carriers. Both transport truckload or carload cargo from the consignor to the consignee in a single container without transfer of lading. A difference is that, unless the shippers and consignees are on sidings, door-to-door pickup and delivery cannot be made by rail car as in the case of motortruck trailers. Uncertainty of ocean transport, infrequency of sailings, and longer transit time than by TOFC, are factors present both in sea-land and Seatrain service.

Many shippers would not use sea-land service unless the sea-land rates were no higher than the Seatrain rate. One shipper at Syracuse, N.Y., whose plant was constructed for rail shipments, would prefer to ship by all-rail or by Seatrain, rather than by sea-land. At least one shipper would discontinue using Pan-Atlantic's service if the sea-land rates were increased above the Seatrain rates. This shipper and the others supporting Pan-Atlantic make no mention of the minimum weights attached to their sea-land

and Seatrain rates, and as between sea-land and Seatrain the record does not justify the prescription of equal minimum weights. Seemingly, the same minima would not be practicable since sea-land shipments use trailer bodies as containers whereas Seatrain shipments move in railroad cars.

It is the position of the water carriers herein that the proposed TOFC rates would precipitate a cycle of destructive competition, contrary to the national transportation policy. Seatrain states that if the TOFC rates are permitted to become effective it will publish immediately rail-water-rail rates reflecting reasonable differentials under the TOFC rates; that Pan-Atlantic could then be expected to publish rates no higher than Seatrain's rates and made differentially under the TOFC rates; and that the net result would be a rate relationship comparable to that now existing but on a substantially depressed basis. It stresses, what appears to us a reasonable conclusion, that the rate-cutting activity probably would not stop even at that destructive level, and that quite certainly a further vicious cycle of rate cutting would ensue.

FOURTH SECTION APPLICATION NO. 34227

Fourth-section application No. 34227 requests authority to maintain the proposed reduced TOFC commodity rates between specified points in eastern territory, on the one hand, and Dallas and Fort Worth, on the other, over the short tariff routes without observing the long-and-short-haul provision of section 4. The rates which would be maintained from and to the higher rated intermediate points are the present class or combination rates. The following are typical examples of the departures.

From Boston, Mass., to Dallas over the direct route composed of the lines of the Boston and Maine Railroad to Mechanicville, N.Y., The Delaware and Hudson Railroad Company to Binghamton, N.Y., the Erie Railroad Company to Huntington, Ind., the Wabash Railroad Company to East St. Louis, Ill., and the Missouri Pacific Railroad Company beyond, the distance is 1,965 miles, and the proposed rate on candy and confectionery is 214 cents. Over this route to Bald Knob, Ark., and Terrel, Tex., 1,543 and 1,930 miles, respectively, rates of 236 and 272 cents will be maintained. From Lancaster, Pa., to Dallas over the direct route composed of the lines of the Pennsylvania Railroad Company to East St. Louis, the Missouri Pacific to Texarkana, Tex., and The Texas and Pacific Railway Company beyond, the distance is 1,591 miles and the proposed rate 204 cents. Over this route to Arkadelphia, Ark., and Terrel, 1,311 and 1,555 miles, respectively, rates of 225 and 253 cents will be maintained.

* The examples offered by the applicants indicate that the earnings over the direct routes would range from 21.8 to 31.6 mills a ton-mile, and from 39.2 to 47.4 cents per car-mile based on a single trailer per flatcar, and 78.4 to 94.8 cents per car-mile based on two trailers per flatcar.

While these earnings and the cost data previously discussed show that the rates generally would be reasonably compensatory, in view of the conclusions reached with respect to the justness and reasonableness of these proposed rates, the application will be denied.

I. AND S. DOCKET NO. 6906

By schedules filed to become effective on April 3, 1958, and later, in these proceedings, Pan-Atlantic and the motor common carrier participants in its

tariffs proposed to establish approximately 94 commodity rates for the transportation in sea-land service of numerous commodities,⁷ in trailerload, multiple-trailerload, and volume quantities, from, to and between numerous points in the East, South, and Southwest. Upon protest of rail carriers in these areas, the operation of the schedules was suspended to and including November 2, 1958, and later, after which the schedules became effective.

The evidence used in computing costs in the instant proceedings is similar to that submitted in I. and S. Docket No. M-10415. Our cost finding section has considered this evidence and has restated the sea-land costs before us. The rationale of the restatement is substantially the same as that in I. and S. Docket No. M-10415. The conclusion is that the proposed rates equal or exceed the out-of-pocket costs for 85 of the listed 94 movements. Representative proposed rates and restated costs are shown in appendix C hereto.

In the restatement of costs, there are nine listed rates which yield less than the out-of-pocket cost. Pan-Atlantic states that it will seek authority to cancel two of these rates, both applying on petroleum products, from New Orleans to Miami and Melbourne, Fla., under investigation in I. and S. Docket No. 6906. Of the remaining seven rates listed in the restatement as not yielding out-of-pocket costs, two are on paper and bags, one on glass bottles, two on

⁷ Sewer pipe, paper and paper bags, petroleum products, clay tile, bottle caps, calcium sulphate, iron oxide, titanium, dioxide toilet preparations, glass bottles, laundry sour, red lead, mortar color, printing paper, synthetic plastics, paper fabric bags, paper boxes, clay n.o.i., resin, canned goods, petroleum, lumber, oak flooring, roofing, ammunition, beer, drain tile, wallboard, and paraffin wax.⁸

synthetic plastics, and two on beer. The rates on paper and bags are from Advance and Hodge, La., to Miami, in I. and S. Docket No. 6906 (109 cents, minimum 64,000 pounds, utilizing two trailers with 32,000 pounds each; out-of-pocket cost, 111 cents); the rate on glass bottles is from Lancaster, N.Y., to Miami, in I. and S. Docket No. M-11077 (184 cents, minimum 22,000 pounds; out-of-pocket cost, 186 cents); the rates on synthetic plastics are from Buffalo, N.Y., to Dallas and Fort Worth, in I. and S. Docket No. M-11077 (195 cents, minimum 30,000 pounds; out-of-pocket costs, 199 and 201 cents, respectively); and the rates on beer are from Philadelphia to Daytona Beach, Fla., in I. and S. Docket No. M-11259 (99 and 85 cents, minima 30,000 and 40,000 pounds, respectively; out-of-pocket costs, 119 and 106 cents).

Only the sea-land rates of Pan-Atlantic, and not the all-rail boxcar rates, are here under investigation. The rail carriers urge that regardless of whether we approve or disapprove the sea-land rates, there should be no prescription of a relationship between the sea-land and the all-rail rates. The rail carriers indicate that if the instant rates are approved, they may counter with reduced rates of their own.

Based on the costs before us, the sea-land rates here in issue generally, with the exception of the nine rates previously noted, are compensatory. The other listed 85 rates exceed out-of-pocket costs, and about 42 per cent of them cover fully distributed costs.

I. AND S. DOCKET NO. M-11375

By schedules filed to become effective on June 9, 1958, and later, the respondents, Pan-Atlantic and the motor-carrier participants in its tariffs, proposed

to establish 65 or more reduced commodity rates for the transportation in sea-land service of numerous commodities,⁸ in trailerload, multiple-trailerload, and volume quantities, from and to points in the East, South, and Southwest. Upon protests of rail carriers and others, the operation of the schedules was suspended to and including January 8, 1959, in the title proceeding, and later in some of the embraced proceedings, after which dates the schedules became effective.

The proposed rates, with certain exceptions, reflect differentials, approximating 5 percent to and from interior points and 7 percent to and from the ports, under the overland rates of rail or motor carriers. In no instance is Pan-Atlantic participating in traffic in competition with the rail or motor carriers except at rates differentially under the all-rail or all-motor rates. For example, when in 1958 a differential on canned foodstuffs from Crystal City, Tex., to Swedesboro, N.J., was removed by a reduction in the rail rate, all of the traffic, which had been handled previously by Pan-Atlantic, was diverted to the railroads.

The cost evidence submitted in these proceedings has also been considered by our cost finding section. Appendix D hereto contains examples of the costs of record as restated by that section in accordance with accepted cost-finding principles. The cost evidence shows that none of the sea-land rates in issue are below out-of-pocket cost, and in most instances the rates exceed fully distributed cost.

⁸ Including copper cable, tires, wallboard, woodenware, chemicals, denatured alcohol, paint, floor covering, aluminum foil, glue, insulating material, synthetic plastics, printed matter, skates, iron or steel bars, petroleum oil, building paper, roofing and roofing material, aluminum articles, aluminum junk, iron or steel castings, and machinery.

In most instances on this traffic, according to the cost data of record, the railroads are the low-cost agency on an out-of-pocket basis, especially where the higher minimum weights are used. For example, on copper cable moving from New Haven, Conn., to Tampa, Fla., when the traffic moves at minimum weights of 30,000 pounds, Pan Atlantic's restated costs are 97 cents per 100 pounds and the rail restated costs are 101 cents, so that Pan-Atlantic's costs are 96 percent of the rail costs. However, when the 60,000-pound minimum is used, Pan-Atlantic's costs remain at 97 cents because of the necessity of using two trailer boxes, while the rail costs decrease to 67 cents, or a ratio of sea-land to rail of 145 percent. No rail fully distributed costs are on this record, nor was any attempt made to show all-motor costs.

During September 1958, the Coast Guard reclassified the dead weight tonnage of the Pan-Atlantic vessels. The tonnage capacity of each vessel was increased by 500 tons, which according to Pan-Atlantic results in a substantial reduction in vessel cost per ton carried. We find that the sea-land rates equal or exceed the out-of-pocket costs for all movements, and are compensatory.

The protestants indicate that if the instant rates are approved, they intend to counter with reduced rates of their own.

SUMMARY AND CONCLUSIONS

The sea-land, Seatrail, and TOFC rates here under investigation, with the few exceptions noted, appear to be compensatory. Many of them are above the fully distributed costs shown, and, with the exceptions mentioned, all are above the out-of-pocket costs. The next, and the most important, question is whether these rates constitute destructive competition.

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As related, the sea-land rates of Pan-Atlantic, in general, are lower than the corresponding rail rates, but by lesser amounts than differentials which existed by reason of the rates formerly maintained in connection with Pan-Atlantic's break-bulk service. At the same time, Pan-Atlantic's costs of the sea-land operation are from \$10 to \$12 a ton less than the cost under its break-bulk service.

Unquestionably, Pan-Atlantic's former break-bulk service was inferior to rail service. While many of the service disadvantages of the former break-bulk operation have been overcome by the sea-land operation, the preponderance of the testimony on these records is to the effect that most of the shippers prefer rail service to sea-land service except at lower rates for the latter. The records show no instance of any traffic moving by sea-land except at rates lower than the rail rates. We must conclude, therefore, that, in order to attract traffic, the sea-land service must establish rates somewhat below those of the rail carriers from and to the same points, and that Seatrain, whose rates and service are comparable to Pan-Atlantic's, is in a like position.

In the prior report in I. and S. Docket No. M-10415 the division concluded that the proposed sea-land rates there under investigation would not be competitively destructive. As explained, the rail carriers do not attack that conclusion in their petition for reconsideration. We agree with the division, and we further conclude that the compensatory sea-land and Seatrain rates under investigation in the other proceedings also are not competitively destructive.

The proposed TOFC rates would be on a parity with the current sea-land rates, and, as indicated, are on the level of the motor common carrier rates, based on the assumption that the TOFC and sea-land

services have many of the characteristics of overland motor service. The motor carriers agree that a differential of sea-land rates under TOFC rates is justified. They are not prepared to suggest what that differential should be.

Pan-Atlantic and Seatrains contend that the proposed TOFC rates are unlawful because they would wipe out existing differentials and place the rail rates on the exact level of the sea-land and Seatrains rates. They insist that they must have rates lower than the rail rates if they are to move any substantial volume of this traffic.

All of Pan-Atlantic's traffic is competitive. On the other hand, Pan-Atlantic argues that the traffic which the railroads seek to retain or obtain in competition with Pan-Atlantic and Seatrains constitutes only a small part of their total traffic in the areas here affected, and that because of the volume of their non-competitive traffic the railroads could, if permitted to do so, reduce their sea-land competitive rates to an out-of-pocket cost basis and make up most or all of the difference between that level and their fully distributed costs on other traffic.

Pan-Atlantic, if it is to continue in operation, must recover its fully distributed costs on the overall sea-land operations. Thus, if the differentially lower rates which Pan-Atlantic must maintain to attract traffic in competition with the railroads were forced by such competition to be reduced to a point where, in general, they failed to recover operating costs plus a reasonable return, obviously its sea-land operations would become unprofitable and their continuance would be threatened.

Pan-Atlantic insists that under the act, interpreted in the light of the national transportation policy, we are required to prescribe a differential in its favor

in order to preserve its operations as an essential part of the national transportation system. It seeks a minimum differential in its favor of 10 percent under the rail TOFC rates, and concedes that its differential under the rail boxcar rates should be somewhat less. It states that experience has shown, generally speaking, that a 5-percent differential, sea-land under rail boxcar rates, is the minimum that will permit sea-land participation in the traffic.

Seatrain asks that whatever action we may take in prescribing a relation between the sea-land and rail rates, such action be given effect through the medium of a minimum rate order which will preserve the differentials now enjoyed by Seatrain in competition with the railroads.

The restated sea-land costs, both out-of-pocket and fully distributed, are below the restated TOFC costs for all movements on which the proposed TOFC rates would apply, as computed for flatcars with a single trailer, and also for ~~all but 2 of the 66 movements~~ computed for 2 trailers on a TTX car. Comparing the rail boxcar service with sea-land, on some of this traffic, particularly port-to-port traffic and certain other traffic subject to the higher single-trailer minima, Pan-Atlantic is shown as the low-cost agency; on the other traffic, the railroads' costs appear to be lower. No witness hazarded a guess as to the probable division of the TOFC traffic under the proposed rates as between single-trailer and two-trailer movement. The rail costs of transporting TOFC shipments would of course vary considerably depending upon whether a flatcar carrying only one trailer or a TTX car carrying two trailers were used; the choice of the equipment used would rest entirely with the railroads. Also, a shift from one port to another by Pan-Atlantic,

which is frequently required by the peculiarities of the service, can effect a substantial change in the water-carrier costs on any of this traffic. Moreover, we do not have before us the rail costs as to many of these rates; and, as discussed in detail in the prior report, other considerations enter into the factor of inherent advantages. For the foregoing reasons, we cannot determine on these records where the inherent advantages may lie as to any of the rates in issue. We must recognize, also, that cost is only one of the elements which may appropriately be considered in passing upon the lawfulness of rates. In the exceptional circumstances here presented, other considerations, herein discussed, appear to us determinative of the issues.

In dealing with competitive rates, section 15a(3) prohibits us from holding the rates of a carrier to a particular level to protect the traffic of another mode. That prohibition, however, is qualified by the words "giving due consideration to the objectives of the national transportation policy declared in this Act." Clearly, the prohibition does not mean that rates which fail to meet other standards of lawfulness in the act, interpreted in the light of the national transportation policy, must be approved because an effect of their disapproval might be to protect the traffic of a competing mode. It is the declared national transportation policy, among other things, to provide for fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service, and foster sound economic conditions in transportation and among the several carriers, all to the end of developing, coordi-

nating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

Since the enactment of section 15a(3) in 1958, we have had occasion to apply its provisions in a number of situations where rate reductions motivated by intermode competition were under consideration. We have refused to condemn the compensatory rates of carriers even though they were reduced below the prevailing level of the rates of competing modes, in the absence of a showing of unlawfulness under the act. See *Lumber, California and Oregon to California and Arizona*, 308 I.C.C. 345; *Paint and Related Articles in Official Territory*, 308 I.C.C. 439; *Sugar to Ohio River Crossings*, 308 I.C.C. 167; *Magnesium from Velasco, Tex., to East St. Louis, Ill.*, 309 I.C.C. 659. None of the prior proceedings, however, presented a situation such as that before us here. The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence, of the coastwise water-carrier industry generally.

The record shows that where there were 19 companies with 139 vessels operating in the Atlantic-Gulf coastwise trade prior to World War II, today only 2 deepwater common carriers are operating in that trade with 7 vessels, 3 by Pan-Atlantic and 4 by Seatrains. And where approximately 8.5 million tons annually were transported in the Atlantic-Gulf coastwise trade prior to the war, the present capacity of the remaining vessels in that trade is only 1.8 million tons. In 1959, Pan-Atlantic's total tonnage, coastwise

and Puerto-Rican trades, approximated 600,000 tons, as compared with over 1,000,000 tons coastwise alone in 1941. At the outset of World War II, all of the vessels employed in the deepwater coastwise trade were taken over by the Federal Government for national defense.

The importance of coastwise shipping for national defense purposes has been emphasized repeatedly from various governmental sources. Thus, the United States Maritime Administration in "A Review of the Coastwise and Intercoastal Shipping Trades," published in December 1955, stated, in part:

In short the crux of the coastwise-intercoastal shipping problem is in the break-bulk dry-cargo trade today as it was before the war. The re-establishment and preservation of this segment of the domestic fleet is of vital national defense importance if the immediate needs of a future grave national emergency are to be met. It is obvious that the ready availability of ships employed in domestic operations may well be a critical factor in any initial military or civil defense operation of the United States occasioned by a future atomic or thermonuclear war.

Further, an economically sound, low-cost domestic fleet will continue to make important contributions to the economic growth and development of the United States as a whole and a balanced national transportation system in particular.

In a report on domestic water carriers by the Committee on Interstate and Foreign Commerce of the Senate, entitled "1950 Merchant Marine Study and Investigation," made pursuant to Senate Resolution

50, Report 2494, 81st Congress, 2d session,^o that Committee said, at page 17:

One fact stands out, and that is the essentiality of coastal water service to shippers the country over. * * *

Finally, of course, is the importance to national defense of having domestic tonnage readily available in an emergency. This fact must not be overlooked in discussing the importance of this segment of the merchant marine in terms of national policy.

As indicated in the next preceding quotation, coastwise shipping is important also for general public use as an integral part of the national transportation system. The following taken from *War Shipping Administration T. A. Application*, 260 I.C.C. 589, 591 (1945), is true today:

The dependency of ports and coastal areas upon the existence of water transportation is well known. The economy of such areas, to a large extent, is founded upon the availability of such transportation, without which a large part of their economy would not have been developed, and with the discontinuance of which a large part of their normal economic activity will cease to exist.

Section 307(f) of the act provides that in prescribing just and reasonable rates by water, we shall give due consideration, among other factors, to the effect of the rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient

^o Quoted by the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Interstate and Foreign Commerce in its report, dated August 29, 1960, on the "Decline of the Coastwise and Intercoastal Shipping Industry," 86th Congress, 2d session.

water transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable water carriers, under honest, economical, and efficient management, to provide such service. The provisions of this paragraph are similar to those in Sections 15a(2) and 216 (i). Also, section 305(e) provides that "Differences in the * * * rates * * * and practices of a water carrier in respect of water transportation from those in effect by a rail carrier in respect to rail transportation shall not be deemed to constitute * * * an unfair or destructive competitive practice."

Section 307(d), in authorizing the Commission to establish through routes and joint rates in connection with water and rail carriers, provides that "where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water." While this provision is not controlling here, where the rates by water under investigation were voluntarily established, and most of them apply in connection with a water carrier and motor carriers, nevertheless, considered with the other provisions of the act above mentioned, it appears indicative of the congressional intent that, where necessary to permit an essential, efficiently operated water carrier to participate in the economical movement of traffic, the service in connection with the water carrier should be accorded some advantage in the form of lower rates. This is so not only on traffic between the ports, but also to and from interior points, for coastwise carriers cannot survive on port-to-port traf-

fic alone. As stated in *Deming Rates from Eastern Ports to the Southwest*, 264-I.C.C. 551, 559:

The steamship lines plying between north Atlantic and Gulf ports must, in order to operate successfully, participate in the handling of traffic to and from interior points. In order to participate in such traffic, the rates over such lines must be on a lower level than those over all-rail routes.

There is no contention that the coastwise lines here before us are not efficiently operated. Shipper evidence on these records is indicative of a need by the general public for the services of those lines, and that they represent an important and essential part of a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense. There is, of course, a limit beyond which these carriers cannot be expected to attract traffic from interior points at economical rates. We are satisfied that their rates here under investigation, except as noted in the findings herein, do not go beyond that limit.

In the circumstances presented here, we are of the opinion that the objectives of the national transportation policy require the establishment and maintenance of a differential relationship between the rates under investigation on sea-land and Seatrains service, on the one hand, and the rates of the rail carriers, on the other, which will allow these water carriers operating in the coastwise trade to maintain rates that will enable them to continue efficient and economical coastwise service.

It appears to us, however, that the 10-percent differential sought by Pan-Atlantic would be excessive. The differences between the sea-land and the all-rail services are not so marked as to require that wide a

rate difference. In our judgment, the rail TOFC rates on the commodities from and to the points concerned in I. and S. Docket No. 6834 should be maintained on a level no lower than 6 percent above Pan-Atlantic's sea-land rates, so long as the latter are not increased above their present levels. While the matter of an appropriate differential for sea-land service or Seatrain service under rail boxcar service is not here directly in issue, it may be helpful for the future guidance of the parties to express our view that, as boxcar service is inferior to TOFC service, the differential under the boxcar rates should be somewhat less than 6 percent.

Upon reconsideration, in I. and S. Docket No. M-10415 and the proceedings embraced therein we affirm the prior findings that 11 of the rates under investigation on the commodities from and to the points shown in footnote 4 of this report are not shown to be just and reasonable, and that the other rates under investigation are lawful.

In I. and S. Dockets Nos. 6906 and M-11375, and proceedings embraced therein, we find that nine of the rates under investigation, on the commodities from and to the points shown in the footnote,¹⁰ are noncompensatory and thus are not shown to be just and reasonable, and that the other rates under investigation are lawful.

In No. 32313, we find that the sea-land rate of 216 cents, minimum 20,000 pounds, on paint and paint materials from Baltimore to Dallas and Fort Worth,

¹⁰ Paper and paper bags from Hodge and Advance, La., to Miami, Fla.; petroleum products from New Orleans, La., to Melbourne and Miami, Fla.; glass bottles from Lancaster, N.Y., to Miami; synthetic plastics from Buffalo, N.Y., to Dallas and Fort Worth, Tex.; and beer from Philadelphia, Pa., to Daytona Beach, Fla.

is unjust and unreasonable, and that the other sea-land rates and the Seatrain rates under investigation are lawful.

In I. and S. Docket No. 6834, we find that the proposed reduced TOFC rates are not shown to be just and reasonable, and the proposed schedules will be required to be canceled, without prejudice to the filing of new schedules in conformity with the conclusions herein. Since these proposed rates are not shown to be just and reasonable, the fourth-section application for relief to establish such rates will be denied.

Appropriate orders will be entered.

COMMISSIONER HUTCHINSON, concurring:

I am in general agreement with the majority report.

In I. and S. Docket No. 6834, the majority concludes that on a fully distributed basis, sea-land is a lower cost service than TOFC. Thus the ultimate effect of approval of the schedules would be to allow rates of the high-cost carrier to gravitate to a level whereby the low-cost carrier will be forced to go below its full costs in order to participate in the traffic.

A regulated competitive mode of transport maintaining rates not in excess of maximum reasonableness should not publish reductions resulting in revenue losses; for the sole purpose of obtaining traffic being handled by another mode. Such proposals constitute, in my opinion, destructive competitive practices which the national transportation policy condemns.

I am not convinced, however, that a differential of 6 percent is warranted on this record, but since I do not believe the "without prejudice" finding constitutes an effective prescription of a differential, I concur in the majority decision.

COMMISSIONER MCPHERSON, concurring in part:

I would approve all the rates which are compensatory, but on this record I would not impose any differential.

COMMISSIONER FREAS, whom CHAIRMAN WINCHELL and COMMISSIONER WEBB join, dissenting in part:

My views concerning the issues presented in I. and S. Docket No. M-10415 have been set forth in a separate expression to the prior report of division 3 in this proceeding, 309 I.C.C. 587, 606. The same reasoning is in general applicable to the other proceedings embraced herein. I shall therefore confine my remarks to the additional points raised by the parties and by the majority in its Summary and Conclusions.

With one possible exception, neither respondents nor protestants appear to dispute the basic concepts set forth in my prior expression, particularly those dealing with the guiding principles to be followed in competitive ratemaking. The railroads do contend that these principles go too far and overlook a tremendous impetus which they would give to private carriage. Apparently the railroads believe that the effect of those principles would be to require the return of fully distributed costs in every instance. That anyone should place such a construction upon my prior expression was wholly unexpected. The views expressed dealt with the situation at hand which is limited to intermode competition between regulated carriers. The standards set forth in no way preclude action necessitated by either the existence or the threat of exempt transportation.

Pan-Atlantic merely asserts that my suggestion as to cancellation and refiling of rates in conformity with the guiding principles would not be "practicable" here. It contends that because of the strong conflict between the parties concerning the relative values or advantages of the respective services to the shipping public unavoidable litigation would in most instances follow such refiling. This contention is not directed to the principles involved but to the evidentiary facts. The determination of these factual issues would be relatively simple were it not for the broad scope of the proceedings here, which involve hundreds of different commodity rates. The burden of proof is on respondents; in the absence of a clear showing of representativeness, orderly regulatory processes preclude the approval of differentials in all instances upon justification only of some.

In support of its conclusion that rate differentials, rail over water, are warranted here, the majority appears to rely heavily upon the national transportation policy. It is said that the differentials are necessary in order to allow the coastwise lines to continue their essential service. Specifically the majority stated: "Shipper evidence on these records is indicative of a need by the general public for the services of those lines, and that they represent an important and essential part of a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense." However, all that the record indicates in this regard is that although in certain instances shippers may consider the advantages or disadvantages of the respective

services offered, the controlling factor in choosing between the involved modes of carriage is generally the level of the rates. There is no evidence here that either the commerce of the United States or the national defense would be hampered unless the water carriers, though not shown to have the inherent advantage in many instances, are given an artificial rate advantage. A reiteration of some of the language contained in the national transportation policy is in and of itself no substitute for essential supporting evidence. See *Pacific Inland Tariff Bureau v. United States*, 129 F. Supp. 472. Nor are there any subsidiary findings in the report to substantiate any of the specific differentials proposed by the water carriers or suggested by the majority.

The decision of the majority may well be taken to stand for the proposition that water carriers are ordinarily entitled to rate differentials regardless of the circumstances of the specific case. I do not read the statute to require as a matter of law, or even to permit, blanket protection from reasonable competition for the water carriers, or for that matter for any mode of transportation. Indeed, even the water carriers have not gone this far in their construction but have, in the last Congress, sought legislation to that effect.

Appendix B

Rationale of cost finding section

Cost evidence:

Cost evidence relating to the trailer-on-flatear service was introduced by the southwestern rail carriers, eastern rail carriers, and by the protestant, Pan-Atlantic Steamship Company. The eastern rail carriers introduced a cost study for TOFC service based almost wholly on cost factors introduced by the southwestern rail carriers. Since the cost evidence of the southwestern rail carriers will be discussed in detail below, further comments on the eastern rail carriers' cost evidence is considered unnecessary.

The Missouri Pacific Railroad Company introduced revenue and expense data intended to show that the proposed TOFC rates would produce compensative revenue when compared with the average revenue and operating expenses of carriers in the central, western, and southwestern regions. The revenues and expenses were shown on a per ton-mile and a per car-mile basis for all traffic combined. In addition to not providing a separation of the expenses between terminal and line-haul and between out-of-pocket and fully distributed, these figures do not reflect the special characteristics of TOFC traffic, and, therefore, are without probative value in measuring the compensatory nature of the proposed rates.

The southwestern rail carriers originally presented cost data for the TOFC service with costs based on handling one trailer per flatear, two trailers per flatear, and with percentages of empty return of zero, 50, and 100 percent. Subsequently additional evidence was introduced which superseded the original presentation. This latter evidence was based on costs for the year 1956 from Statement No. 2-58 of the Bureau of Accounts, Cost Finding and Valuation, and ad-

justed by respondent to a level of May 1, 1958. It compares out-of-pocket costs with the proposed rates for one trailer per car, for two trailers per car, and on a combined basis reflecting 75 percent two trailers per car and 25 percent one trailer per car. The empty return ratio used for the line-haul expense was 25 percent. The respondent considered the combined showing to be the most appropriate, although it conceded that such a performance was not presently attained. Based on respondent's cost presentation the proposed rates exceed out-of-pocket costs for all movements.

The protestant water carrier took many exceptions to respondent's cost presentation and restated the costs. A comparison of the proposed rates with the protestant's restated out-of-pocket costs showed most of the rates to be below out-of-pocket cost.

In order to more fully understand the cost elements involved herein a short description of the services rendered the TOFC traffic may be helpful. At point of origin the trailer is loaded at the shipper's dock and then moved to the ramp area of the originating railroad. The trailer is subsequently loaded onto the flatcar and is tied down or made secure to the car. Upon completion of the loading the cars are switched from the ramp to the outbound train along with other types of cars. The train is then given a line-haul movement to the western gateway where the TOFC cars are switched to the delivering railroad's ramp, and the trailers are untied and removed therefrom. At the present time the TOFC cars are not interchanged between the railroads so that direct movement of the trailers is required for delivery to the connecting line. After delivery to the connecting carrier's ramp the trailers are again placed on flatcars and tied down and subsequently

moved to final destinations, where the cars are again switched to a ramp, the trailers untied and removed, delivered to the consignee and unloaded, and returned to the railroad terminal. So far as these proceedings are concerned two types of cars are involved: one is a flatcar of single trailer capacity which is equipped with tiedown devices; and the other is a car especially designed to hold two trailers with special holddown devices. The latter type of car is at present not owned by the railroads but is leased from a car company under mileage agreement and is referred to as a trailer-train car. The abbreviation of TTX will be used herein in referring to the two-trailer cars while the single-trailer cars will be referred to as R.R.-owned cars.

In view of the many points of controversy over the cost evidence in these proceedings, each element of cost will be discussed individually below with the comments and evaluation by the cost finding section immediately following each item.

(1) Source and level of expense data:

RESPONDENT

In its final cost presentation respondent based its rail costs on unit expenses shown in Statement No. 2-58 of the Bureau of Accounts, Cost Finding and Valuation, which showed costs for the year 1956 and also costs adjusted to a level of January 1, 1958. Respondent considered the costs as of January 1, 1958, to be overstated, and therefore used the 1956 costs adjusted to what it purported to be a May 1, 1958, level. This was accomplished as follows: The total operating expenses for the year 1957 were related to the total operating expenses for the year 1956 for the eastern district and western district separately. The percentage of increase was found to be

1.57 percent for the eastern district and 0.83 percent for the western district. A cost-of-living adjustment of 4 cents per hour as of May 1, 1958, was applied to the total service hours for the year 1957, United States as a whole, and the resulting amount of increase was related to the total operating expenses for the year 1956 for the United States as a whole to produce an additional adjustment of 1.14 percent. The latter amount was added to the previous percentage increases for the eastern and western districts to produce total adjusting percentages of 2.71 percent for the eastern district and 1.97 percent for the western district. These percentage adjustments were applied to the expenses for 1956 by respondent to produce costs as of May 1, 1958.

Respondent showed costs on an out-of-pocket level only. It contends that the amount of additional revenue which a commodity should produce above out-of-pocket cost should be contingent upon what the traffic can bear rather than on an arbitrary prorate based on averages of all traffic. Therefore, it did not show fully distributed expense.

PROTESTANT

In its restatement of the rail costs in respondent's exhibit No. 3 protestant used the costs for the year 1955 shown in Statement No. 1-57, issued by the Bureau of Accounts, Cost Finding and Valuation, and underlying working papers thereto. These costs were adjusted for wage and price levels to January 1, 1958, based on data shown by rail carriers in Ex Parte No. 212.

Protestant showed its costs both on an out-of-pocket and fully distributed basis. The out-of-pocket costs include 80 percent of the operating expenses,

rents, and taxes, excluding Federal income taxes, plus a return of 4 percent after Federal income taxes, and 50 percent of the road property and 100 percent of the equipment. The fully distributed costs include, in addition to the out-of-pocket costs, the remaining 20 percent of the operating expenses, rents, and taxes, the passenger train and less-than-carload operating deficits and return of 4 percent after Federal income taxes on the property as a whole. The revenue needs over and above the out-of-pocket costs are given a prorate ton and ton-mile distribution over all revenue traffic without distinction as to kind or class.

COST FINDING SECTION'S COMMENTS

The method used by respondent to adjust the 1956 expenses to a May 1, 1958, level completely ignores the amount of traffic moving in the respective years because only the total operating expenses and a cost-of-living adjustment are used to obtain the final adjusting factors. Respondent's method of adjustment is unacceptable.

The method of adjustment to a level of January 1, 1958, used by protestant assumes the same level of traffic for both periods but adjusts for the level of wages and prices. When the adjustment is made in this manner for only a 1-year period there is small likelihood of error. However, when such adjustment is made for 2 years or more there is a possibility of overstatement since any increase in efficiency of operations is ignored.

In view of the fact that the sea-land costs reflect 1957 expenses and the TOFC pickup and delivery, tiedown cost and trailer rental expenses are based generally on the year 1957, the remaining TOFC expenses should also reflect a level for the year 1957.

Accordingly the cost finding section believes that the costs shown in its Statement No. 2-58, which are based on the year 1956 operations with adjustment to reflect wage and price levels as of January 1, 1958, are appropriate for use herein and these costs have been used in the restatement of respondent's and protestant's cost evidence. (A check of the costs shown in cost finding section's Statement No. 5-58, which shows costs based on expenses for the year 1957, indicates very close agreement between those costs and the costs as of January 1, 1958, shown in Statement No. 2-58. The costs in Statement No. 5-58 would have been used in the cost finding section's restatement except for the fact that this statement is not of record.) The out-of-pocket cost is the significant measure as to whether or not a rate is compensatory, but for comparative purposes we have also supplied the fully distributed costs in our restatement.

(2) Switching at origin and destination:

RESPONDENT

For the cost of switching at the TOFC ramps, respondent used one-third of the territorial average switching time. The factor of one-third was based on data furnished by the Pennsylvania Railroad Company and the Baltimore and Ohio Railroad Company in the East, and the Texas and New Orleans Railroad Company, Texas and Pacific Railway Company, St. Louis Southwestern Railway Company, and Missouri Pacific Railroad Company in the Southwest. In computing the switching expense per car respondent included an allowance of 25 percent for switching empty cars.

PROTESTANT

Protestant contended that the data supplied to respondent by the various railroads were deficient in that they did not make allowance for switching of the empty car or for nonproductive time of the yard locomotives. Protestant stated that the switching data used by respondent was, in some instances, based on estimates, and it contends that a detailed study should have been made to determine the switching time of the TOFC traffic. The protestant restated the switching minutes to include an allowance for switching of empty cars equal to the number of loaded cars and for nonproductive time. In the eastern district, protestant's restated figure amounted to 12.9 minutes per car which, when related to the territorial average of 30 minutes per car, produced a ratio of 43 percent. Protestant used 45 percent of the territorial average in its restatement. In the western district, protestant used a restated figure of 16.4 minutes per car which, when compared with the total average of 26 minutes per car, produced a ratio of 63 percent. Protestant used a ratio of 65 percent in its restatement.

COST FINDING SECTION'S COMMENTS

We believe that respondent should have made detailed switching studies to determine the switching minutes per car for the TOFC traffic. In its restatement of respondent's switching minutes for the eastern district, the protestant used only the minutes for the Pennsylvania Railroad Company at Kearney, New Jersey, Pittsburgh, and Philadelphia, and for the Baltimore & Ohio at Philadelphia. It ignored the time at St. Louis of 2.1 minutes per car submitted by the Pennsylvania in a letter to protestant under date of March 25, 1958, which is part of the working papers that parties agreed could be used. When this

time is taken into account and adjusted for empty and nonproductive time, the average switching minutes in the eastern district is reduced from 12.9 minutes to 11.4 minutes. The cost finding section does not agree with protestant's use of 100-percent allowance for empty switch which is normal for other than boxcar traffic. Once the loaded TOFC cars have been placed in the ramp there is no need to switch them away from the ramp until they are to be made up into a returning train except in those instances where the capacity of the ramp is limited to less than the total number of cars received. Except for reference to the four-car capacity of the Baltimore & Ohio TOFC ramp at Philadelphia, the record does not provide evidence as to this necessity and, in the absence thereof, the cost finding section believes that an allowance for switching empty cars equal to the amount of empty movement that is present in the line-haul operation is appropriate. Therefore, we have adjusted protestant's switching minutes to reflect 25 percent empty switching in the Eastern district and 50 percent empty switching in the western district. The use of these empty return ratios is discussed in a subsequent item. The adjusted switching minutes per car compute to 7.13 minutes in the East and 12.30 minutes in the West. When related to the territorial average minutes per car of 30.6 in the East and 26.7 in the West shown in statement No. 2-58, the ratio of TOFC switching minutes to the territorial average becomes 23 percent for the East and 46 percent for the West.

(3) Freight-train car costs:

RESPONDENT

Respondent used a ratio of 45 percent of the territorial average for the freight-train car costs of rail-

road-owned cars. This was based on an average detention at origin and destination combined of 1.7 days as compared to the territorial average of 3.75 days. Respondent made no distinction between railroad-owned cars and privately owned cars.

PROTESTANT

Protestant also used a ratio of 45 percent of the territorial average for railroad-owned cars. The protestant developed the rental expense per car-mile for the TTX cars separately and the freight-train car costs for these cars is reflected in the line-haul expense.

COST FINDING SECTION'S COMMENTS

In its restatement of the costs the cost finding section has used 45 percent of the territorial average for the TOFC freight-train costs for railroad-owned cars and has used protestant's treatment for the TTX cars.

(4) Carload station clerical expense:

RESPONDENT

Respondent included carload station clerical expense based on 50 percent of the territorial average for the East and for the West.

PROTESTANT

Protestant included this expense in total for each territory.

COST FINDING SECTION'S COMMENTS

In view of the fact that the TOFC traffic is interchanged between the eastern district and the western district and would move on through billing respond-

ent's treatment is proper and has been followed in the cost finding section's restatement.

(5) Loss and damage expense:

RESPONDENT

Respondent included the territorial loss and damage clerical expense and the loss and damage claim payments based on the United States average for all other manufacturers and miscellaneous articles and for alcoholic beverages or liquor separately.

PROTESTANT

Protestant also included loss and damage clerical expense and loss and damage claim payments except that protestant included the loss and damage claim payments for each territory rather than once for the entire movement.

COST FINDING SECTION'S COMMENTS

In obtaining the loss and damage clerical expense from the carload unit cost sheets protestant used the expense per ton shown therein for an expense per hundredweight. Protestant's expenses of 0.599 cent for the eastern district and 1.472 cents for the western district should have been 0.030 cent and 0.074 cent, respectively. The loss and damage claim payments should have been included only once for the entire movement since these figures are based on United States averages without regard to length of haul. The loss and damage clerical expense and the loss and damage claim payments have been included correctly in our restatement.

(6) Interchange expense:

RESPONDENT

The costs from Statement No. 2-58 include interchange expense in the line-haul expense based on a cost per car-mile. The statement provides for eliminating the interchange expense per car-mile and stating it on a per interchange basis where such treatment is desired. Respondent has availed itself of this option and has included interchange expense based on 1.5 interchanges per loaded move in the East and 0.5 interchange in the West, subsequently increased for the empty movement. Over-the-street trailer interchange cost at the gateway point between eastern and western territories is included separately. Respondent contends that interchanges between certain carriers do not entail the switching and cost normally associated with interchange service and that they are merely paper transactions for division of revenue purposes. This would be true for interchanges between the Missouri Pacific and the Texas and Pacific, the Atchison, Topeka and Santa Fe Railway Company and the Gulf, Colorado and Santa Fe Railway Company and the Kansas City Southern Railroad Company and Louisiana & Arkansas Railway Company, and would also be true of certain interchanges in the East. Respondent stated that in the western district it could not foresee any interchanges other than the so-called paper interchanges of TOFC traffic destined to Dallas or Fort Worth as between the western district carriers, since the carriers named above provide direct routes between the gateways and Dallas and Fort Worth.

Rates, costs, and cost ratios

Commodity	Sea-land								Trailer-on-flatcar								Ratios*			
	Min.	Rate	Costs		Ratio, rate to costs		Min.	Rate	Costs				Ratio, rate to costs				SL to TOFC costs			
			OP	FD	OP	FD			OP		FD		OP		FD		OP		FD	
									RR	TTX	RR	TTX	RR	TTX	RR	TTX	RR	TTX	RR	TTX
Ammunition, from New Haven, Conn.	30	299	138	175	217	171	30	299	214	186	259	231	140	161	115	129	64	74	68	76
Candy or confectionery from Boston, Mass.	36	214	139	179	154	120	36	214	190	172	236	218	113	124	91	98	73	81	76	82
Paint and paint materials from Jersey City, N.J.	36	190	111	137	171	139	36	190	182	166	225	209	104	114	84	91	61	67	61	66
Printed matter from Philadelphia, Pa.	23	273	172	212	159	129	23	273	250	204	292	246	109	134	93	111	69	84	73	86
Wire goods, aluminum from York, Pa.	14	438	281	334	156	131	30	438	345	246	386	287	127	178	113	153	81	114	87	116

SL is sea-land; TOFC is trailer-on-flatcar; TOFC rates are proposed; Min. is minimum weight in 1,000 pounds; ratios are in percents; OP is out-of-pocket; FD is fully distributed; RR signifies railroad-owned flatcars with a capacity of one trailer; TTX signifies leased flatcars with a capacity of two trailers; destination of shipments is Dallas-Fort Worth.

PROTESTANT

Protestant takes exception to respondent's reduction of the number of interchanges. It contends that even though complete switching service may not be required for those points referred to as paper interchanges there is still some cost associated with such service which should be included. In developing the line-haul cost, the protestant has used both a shortest route and a longest route over actual rail lines and has included the expense for the actual number of interchanges required over each, including so-called paper interchanges.

COST FINDING SECTION'S COMMENTS

Respondent is correct in its contention that the cost for a paper interchange is considerably less than the cost for an interchange where normal switching is involved. However, the elimination of the entire cost for the paper interchanges is not considered proper, considering the fact that the interchange costs in Statement No. 2-58 are based on all types of interchanges as reported by the carriers. Thus, if the cost for paper interchanges were to be excluded the remaining interchange cost would have to be based on the expense per actual interchange which would be somewhat higher than the cost shown in Statement No. 2-58.

Protestant is wrong in including an interchange expense for the transfer of cars between the Atchison, Topeka & Santa Fe and the Gulf, Colorado & Santa Fe railroads. Because these two roads operate and report as a system, the transfer of cars between them is not reported as an interchange. The expense for the transfer is reflected as intertrain or intratrain switching which protestant has included fully on a car-mile basis.

In its restatement the cost finding section has included the average interchange costs expressed on a car-mile basis with the line-haul expenses. Since the interchange at the gateways between the East and West is performed by interchange of the trailer only and not of the rail car, a reduction equivalent to one-half the cost of a full interchange has been applied to the terminal costs in each territory. The effect of this treatment is to include roughly 0.6 interchange for a 900-mile haul in the West and from 1.8 to 2.6 interchanges for hauls of 900 to 1,200 miles, respectively, in the East.

(7) Intertrain and intratrain switching:

RESPONDENT

Respondent included intertrain and intratrain switching on a per car-mile basis but included only 50 percent of the total shown in Statement No. 2-58. The use of 50 percent of the territorial average was not based on any special studies made by respondent but was based on respondent's belief that the trains in which the TOFC traffic moves are subject to less than average switching en route.

PROTESTANT

Protestant included the intertrain and intratrain switching expense on the territorial average basis without reduction.

COST FINDING SECTION'S COMMENTS

In view of the fact that respondent failed to introduce evidence showing that the TOFC traffic actually receives less than the average intertrain and intratrain switching, the use of the territorial average expense for this service is considered to be proper and

has been included in the cost finding section's restatement.

(8) Trailer rental expense:

RESPONDENT

Respondent based its cost for trailer rental on an average charge of \$4 per day for a 1-day period of 6.7 days (round trip 13.4 days) plus an allowance for 25 percent empty return. This amounted to a total cost of \$33.50 per loaded trailer.

PROTESTANT

The protestant stated that the elapsed time used by respondent did not take into consideration the fact that trailers may be idle over the weekend, and that there might not be 100-percent utilization of the trailers; therefore, it based its cost on a 14-day round trip or 7 days one way plus an allowance for empty return. Based on a rental cost of \$4 per day this produced a cost of \$44.80.

COST FINDING SECTION'S COMMENTS

Testimony of record indicates that the running time between origin and destination would average 5 days, or 10 days for the round trip. An allowance of 2 days' time at the origin and at destination would appear to be reasonable. Therefore, in its restatement the cost finding section has used an allowance for trailer rental cost based on a 14-day round trip adjusted for empty return instead of a 13.4-day round trip by respondent. The trailer rental cost thus computed amounts to \$38.50 per loaded trailer. The allowance for empty return for trailer rental amounting to 37.5 percent is the average of 25 percent empty return in the East and 50 percent in the West. These percentages are discussed subsequently.

(9) Trailer interchange expense:

RESPONDENT •

Respondent based its costs for the over-the-street interchange of the trailer at the gateway between East and West on figures furnished by the Baltimore & Ohio and the Pennsylvania, the average of which computed to \$5.25 per hour. Allowing 1 hour for the interchange and adjusting for 25 percent empty return, respondent computed a total of \$6.56 per loaded trailer for the interchange.

PROTESTANT

Protestant based its expense on figures furnished by the Pennsylvania, the Missouri Pacific and the Baltimore & Ohio and included allowance for 100 percent empty movement. A figure of \$24.90 was included for the Baltimore & Ohio, which combined with the amount of \$11.28 for the Pennsylvania and \$15.76 for the Missouri Pacific, produced an average of \$17.31 per loaded trailer.

COST FINDING SECTION'S COMMENTS

The figure of \$12.45, excluding allowance for empty, as used by protestant for trailer interchange for the Baltimore & Ohio, appears to be excessive when compared with respondent's figure of \$4.85. The record does not provide information as to this discrepancy, therefore, the cost finding section has used respondent's figure of \$4.85 in its restatement. Protestant showed a figure of \$7.88 for the Missouri Pacific based on 1.5 hours at a cost of \$5.25 per hour. This latter figure has been included with respondent's figure to produce an average of \$6.12. When the latter amount is adjusted for an empty return amounting to 50

percent, a total cost of \$9.18 per trailer interchange is obtained. The latter figure is used in the cost finding section's restatement.

(10) Trailer tiedown and untie cost:

RESPONDENT

Respondent used a basic cost for placing the trailers on the car and securing them and for releasing them and removing them from the cars of \$9 per trailer in the East and \$8 per trailer in the West. These figures were subsequently adjusted for 25 percent empty return giving total costs of \$11.25 per trailer in the East and \$10 per trailer in the West.

PROTESTANT

After adjusting the figures furnished to respondent by the various railroads for a clerical cost item protestant used figures of \$9.60 per trailer in the East and \$8.50 in the West for the trailer train cars, and \$24.84 in the East and \$8.50 in the western district for railroad-owned cars.

COST FINDING SECTION'S COMMENTS

It was brought out in the record that the figures used by the protestant for tie-down costs in the eastern district were based on figures furnished by the Baltimore and Ohio which included not only the service at the ramp but the movement of the trailers between the ramp and shipper or consignee. In order to correct for this overstatement by protestant the cost finding section has substituted the cost of \$9.60 as used by protestant for trailer train cars for the \$24.84 it showed for railroad-owned cars in the eastern district. In the western district the cost

finding section has used protestant's figure of \$8.50 for both railroad-owned and TTX cars. After adjustment for the respective empty return allowances the total cost per trailer becomes \$12.00 in the East and \$12.75 in the West.

(11) Pickup and delivery expenses:

RESPONDENT

The pickup and delivery costs include the movement of the empty trailer from the carrier's motor terminal to the shipper's dock, the loading of the trailer and the return of the loaded trailer to the ramp at the origin point, and the movement of the loaded trailer from the ramp at destination to the consignee's dock, unloading, and the return of the empty trailer to the ramp or to the carrier's motor terminal. Based on data furnished by the participating railroads respondent developed costs of \$9 per load in the East and \$6.90 per load in the West for the movement of trailers between the ramps and shipper's and consignee's docks. The loading and unloading expense used by respondent was 12.8 cents per hundredweight in the East and 11.3 cents per hundredweight in the West.

COST FINDING SECTION'S COMMENTS

The protestant used the respondent's figures in its cost presentation and the cost finding section has done likewise in its restatement.

(12) Weight of train for TOFC traffic:

RESPONDENT

Respondent based its line-haul costs on those for through trains without adjustment for any reduction in the weight of the train for expedited service. Re-

spondent contends that the TOFC traffic is generally handled in regularly scheduled through trains and thus should reflect the cost of through train operations.

PROTESTANT

Protestant computed its line-haul cost of the TOFC traffic based on through train costs but with the weight of the train reduced by 25 percent. Protestant contends that the TOFC traffic moves in manifest trains and receives expedited service, and that such manifest trains normally operate with tonnage ratings which are from one-third to one-fourth less than other through trains because of the speed at which these trains are operated. It also cited movement by the Pennsylvania Railroad of the TOFC traffic from New York to Philadelphia with only 10 or 12 cars in a train. It also stated that the Baltimore and Ohio trains in which the TOFC traffic is handled have tonnage ratings that have 25 percent to 30 percent less traffic than other through trains. The effect of protestant's treatment is to increase the gross-ton-mile portion of the line-haul expense by roughly 5 percent in the Eastern district and by 3 percent in the Western district.

COST FINDING SECTION'S COMMENTS

Although it may be true that the TOFC traffic may receive expedited service in less than average weight trains in some instances protestant has not shown this to be true generally. With regard to the movement by the Pennsylvania of the TOFC traffic between New York and Philadelphia in small trains this movement comprises only a small part of the total movement from eastern points to the southwest, and it cannot be assumed that because such movement

occurs over a short distance the same would be true for the remainder of the haul. In addition, the effect of protestant's adjustment on the total line-haul expense is negligible. In the absence of special studies which would show the actual average weights of trains in which the TOFC traffic is handled, the cost finding section believes that the use of the through train average cost is proper and this has been used in its restatement.

(13) Tare weight of cars and trailers:

RESPONDENT

Respondent made no adjustment in its costs for the difference in tare weights of the cars used for TOFC service from the tare weight of ordinary flatcars. Also, it made no adjustment for the difference in weight for flatcars of two-trailer capacity from those of one-trailer capacity. In addition, it failed to include the tare weight of trailers in computing its expenses. It also failed to distinguish between railroad-owned cars and cars rented on a mileage basis.

PROTESTANT

Protestant developed its costs for railroad-owned cars and for those cars rented on a mileage basis (TTX cars) separately. Based on figures furnished by several railroads concerned with the TOFC traffic it determined that the tare weight for railroad-owned cars was 55,200 pounds before addition of the tare weight of the trailer. After addition of the 11,500 pounds average tare weight of a trailer the total tare weight of the railroad-owned car becomes 66,700 pounds. For the TTX cars it determined the average weight to be approximately 78,000 pounds before addition of the trailer tare weight. Based on in-

formation furnished by the railroads, protestant determined that in the eastern district the TTX cars were loaded with an average of 1.7 trailers per car and in the western district the TTX cars are operated with an average of 1.45 trailers per car. The total tare weight of the TTX cars and trailers computes to 97,550 pounds in the eastern district and 94,675 pounds in the western district.

COST FINDING SECTION'S COMMENTS

The respondent is in error in not recognizing the difference in tare weights between the type of cars and in not making allowance for the additional tare weight of the trailers. The use by protestant of the average number of trailers per car for the TTX cars is also considered to be proper because this reflects the average utilization of the cars. The cost finding section has used protestant's tare weights in its restatement except for a reduction of 800 pounds in the tare weight of TTX cars based on information in the working papers. It has used average number of trailers in the East of 1.7 trailers per TTX car and 1.5 trailers per TTX car in the western district in its restatement.

(14) Net load per TTX car:

RESPONDENT

Respondent assumed a net load for cars carrying two trailers of twice the minimum weight per shipment.

PROTESTANT

The protestant developed the net load for TTX cars by adding to the minimum weight per shipment an amount equal to 0.7 of an average weight per shipment taken as 30,000 pounds in the East and 0.45 of

30,000 pounds in the western district. The figures of 0.7 and 0.45 are derived from the average number of loaded trailers handled on TTX cars as described in item 13 above.

COST FINDING SECTION'S COMMENTS

The use of twice the minimum weight by respondent is incorrect since it overlooks the fact that a trailer of one minimum weight may be handled with a trailer carrying an entirely different load on the same flatcar and also ignores the fact that the average utilization of the TTX cars appears to be less than the maximum possible of two trailers per car. The cost finding section has used protestant's procedure except that it has rounded off the figure of 0.45 to 0.50.

(15) Empty return ratio:

RESPONDENT

Respondent developed its line-haul expenses using an allowance for empty return of 25 percent for the ratio of empty car-miles to loaded car-miles. This figure was based on judgment and reflects a long range viewpoint. It does not actually represent the empty return ratio experienced at the time the evidence was placed on record. Respondent feels that the figure of 25 percent is a reasonable figure to expect considering the increasing use of TOFC service.

PROTESTANT

Based on information furnished by the participating railroads protestant used ratios of empty to loaded TOFC car-miles of 60 percent for railroad-owned cars in both the East and West, and 23 percent in the East and 100 percent in the West for TTX cars.

COST FINDING SECTION'S COMMENTS

An examination of the working papers shows that in the eastern district the Baltimore & Ohio showed no empty trailer movement on its own cars in either direction during the month of January 1958. During the same month the Pennsylvania showed an empty return of 23 percent for its TTX cars. Based on these showings the cost finding section feels that use of a ratio of empty to loaded car-miles of 25 percent in the eastern district for both railroad-owned and for TTX cars is not unreasonable, and it has used this ratio in its restatement. The working papers also show that in the western district the Texas and New Orleans Railroad showed a ratio of empty to loaded car-miles of 49 percent for the months of October, November, and December, 1957, and January 1958 for railroad-owned cars. Other carriers in the western district showed a ratio of 100-percent empty return for both railroad-owned cars and TTX cars. The cost finding section believes that the high empty return ratios experienced in the western district will not remain static but will be reduced as the TOFC traffic develops. The TOFC service concerned herein is in reality a substitute for boxcar service. It is reasonable to assume, therefore, that the empty return ratio would approach that of boxcars. Statement No. 2-58 shows the ratio of empty to loaded car-miles for carload boxcar traffic to be 36 percent. The use of an empty return ratio of 50 percent for the western district is, therefore, considered to be reasonable and this has been used in our restatement.

(16) Line-haul miles:

RESPONDENT

Respondent based its line-haul miles on the average short-line distance between the origin and the Chicago and East St. Louis gateways, and between the gateways and destination increased by 13 percent to allow for circuitry.

PROTESTANT

Protestant computed costs for so-called shortest practicable routes and longest practicable routes.

COST FINDING SECTION'S COMMENTS

If these proceedings did not involve fourth-section considerations, costs computed for respondent's mileages would suffice. Because fourth-section considerations are involved, the costs based on routes longer than the average are important to measure the compensativeness of the proposed rates over the more circuitous routes. Therefore, the cost finding section has used both respondent's average mileages and protestant's longest mileages in its restatement of the costs.

CONCLUSION

Based on the relationship of present sea-land rates to the sea-land costs as restated for the commodities concerned herein, the present sea-land rates equal or exceed the restated out-of-pocket costs for all movements and exceed the fully distributed expense except for eight movements.

The proposed TOFC rates equal or exceed the restated out-of-pocket TOFC costs computed for hauls with average circuitry for all movements by TTX car and for all but six movements by railroad-owned cars. The proposed rates equal or exceed the fully distributed costs for 14 movements by railroad-owned cars and for 43 movements by TTX cars, out of the 66 rail movements. The restated sea-land costs, both out-of-pocket and fully distributed, are below the restated TOFC cost for all movements of comparable weight.

For hauls with the greatest amount of circuitry the proposed TOFC rates equal or exceed the out-of-pocket costs for 33 of the movements on railroad-owned cars and for 62 of the movements on TTX cars. Based on information in the working papers for these proceedings, it appears that a greater number of trailers is carried on TTX cars than on railroad-owned cars.

APPENDIX D

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding sections 1, 301, 901, and 1001, provides:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 15(7), 49 U.S.C. 15(7), provides:

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual

or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice, and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were

paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 15a, 49 U.S.C. 15a, provides:

(1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

(3) In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of

transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

Section 305(c), 49 U.S.C. 905(c), provides:

(c) It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided*, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

Section 307(d), 49 U.S.C. 907(d), provides:

(d) all common carriers by water shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly

prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this subsection the term "connecting line" means the connecting line of any common carrier by water or any common carrier subject to part I.

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No. **109**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

SEA-LAND SERVICE, INC., Appellant

v.

**THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, ET AL., Appellees**

**On Appeal From the United States District Court for the
District of Connecticut**

JURISDICTIONAL STATEMENT

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Appendix C

Rates, costs, and cost ratios

[Rates and costs in cents per 100 pounds; ratios in percents; min. weights in 1,000 pounds; SL is Sea-Land; OP is out-of-pocket; FD fully distributed; PA is Pan-Atlantic; MC is motor carrier; AR is all-rail]

Commodity	Origins and destinations	SL		OP costs			FD costs			Ratio SL rates to costs		AR rate and costs		OP	FD	Ratios SL to AR costs	
		Min.	Rate	PA	MC	SUM	PA	MC	SUM	OP	FD	Min.	Rate			OP	FD
Sewer pipe	Sherman, Tex., to Clearwater, Fla.	52	124	59	53	112	68	69	137	111	91	36	133.5	88	114	127	120
Bottle caps	New York, N.Y., to Jacksonville	30	125	67	52	119	72	72	149	105	84						
Paper fabric bags	New Orleans, La., to Orlando, Fla.	22	130	58	23	81	68	34	102	160	127						
Rosin	Cross City, Fla., to New York, N.Y.	36	105	63	23	86	72	37	109	122	96						
Canned goods	Fort Pierce, Fla., to Brewster, N.Y.	40	104	44	42	86	51	66	117	121	89						
Petroleum	Baton Rouge, La., to Miami, Fla.	26	117	40	62	102	46	88	134	115	87						
Paper boxes	Miami, Fla., to Philadelphia, Pa.	36	108	51	25	76	59	37	96	142	113						
Ammunition	Bridgeport, Conn., to Alexandria, La.	30	289	68	60	128	59	84	163	226	177						
Canned goods	Fort Pierce, Fla., to New York, N.Y.	40	94	57	22	79	36	36	101	119	93						

1 26,000 pounds are used as load per trailer when two trailers used for 52,000 pounds.

NOTE.—Rail costs are shown for those movements where protestants introduced rail costs. Rail costs are adjusted to reflect loss and damage claim payments, shown in Bureau of Accounts, Cost Finding and Valuation Statement No. 2-58, applicable to the commodities in question.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No.

SEA-LAND SERVICE, INC., *Appellant*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, ET AL., *Appellees*

On Appeal From the United States District Court for the
District of Connecticut

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the District of Connecticut is reported at 199 Fed. Supp. 635. The final judgment of that court is dated January 8, 1962. The decision of the Interstate Commerce Commission dated December 19, 1960 is reported

at 313 I.C.C. 23. The opinion and judgment below, and the report of the Commission have been reproduced as Appendices A, B, and C, respectively, to the Jurisdictional Statement herein of appellant Interstate Commerce Commission.

JURISDICTION

This action was brought under 28 U.S.C. 1336 to set aside and enjoin an order of the Interstate Commerce Commission. The judgment of the district court was entered on January 8, 1962 and appellant Sea-Land Service, Inc., filed its Notice of Appeal in that court on March 9, 1962. The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal: *Virginian Ry. Co. v. United States*, 272 U.S. 658; *Rochester Tel. Corp. v. United States*, 307 U.S. 125.

STATUTES INVOLVED

The statutes involved, the National Transportation Policy and 49 U.S.C. 15(7) and 15a(3) are set forth in the Appendix attached hereto.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether, under Section 15a(3) of the Interstate Commerce Act and the National Transportation Policy, the Commission may find not shown to be just and reasonable, and require cancellation of, certain reduced railroad trailer-on-flatcar rates, which are compensatory (i.e., exceed the railroads' out-of-pocket costs in all instances and their fully-distributed costs in many instances) but represent substantial reductions

from levels maintained elsewhere, to the same levels of the rates of the coastal water carriers and are applicable only to points served by the coastal water carriers, where the water carriers' service cannot compete at equal rates with the railroads' service and where the reduced rail rates are part of a program of rail rate reductions which threatens the continued existence of the coastal water carriers?

2. Whether, under the foregoing circumstances, the Commission may find such rail rates to be unlawful without finding as a controlling consideration that the competing water carriers are the low cost mode of transportation?

3. Whether, if the Commission must make such a finding, it must do so in terms of the "integral overall rate structure" of the competing modes of transportation?

4. Whether, if the Commission must make such a finding, it is precluded from rejecting any rail rate for a particular movement which yields the railroad's fully-distributed cost which is lower than the fully-distributed cost of the competing water carrier?

STATEMENT OF THE CASE

This action was brought by the New York, New Haven and Hartford Railroad Company and other railroads to enjoin an order of the Interstate Commerce Commission dated February 3, 1961, and a report dated December 19, 1960, (313 ICC 23) directing them to cancel substantial rate reductions with respect to 66 movements in their trailer-on-flat car (TOFC) service between points in the East and Texas. The two competing water carriers, Sea-Land Service, Inc.

(hereinafter called Sea-Land), and Seatrain Lines, Inc. (hereinafter called Seatrain) protested the proposed rates before the Commission, and appeared before the lower court to defend the order below. The United States and the Interstate Commerce Commission also appeared in the lower court and defended the order. The complaint attacked the Commission's determination that the TOFC rates at issue are unjust, unreasonable, and unlawful primarily on the ground that such a finding is precluded by the provisions of Section 15a(3) of the Interstate Commerce Act (49 USC § 15a(3)).

The court below in its judgment entered January 8, 1962, set aside and vacated the above described report and order of the Commission, entered December 19, 1960, and February 3, 1961, respectively, to the extent that they found unlawful and unreasonable the trailer-on-flat car rates at issue, without prejudice to such further proceedings as the Commission may deem appropriate.

The following facts, as found by the Commission in its report, appear not to have been contested by the railroads before the district court:

1. That the reduced railroad trailer-on-flatcar rates at issue represent substantial reductions from levels maintained elsewhere;

2. That these rates were published solely for the purpose of establishing a basis of rates exactly equal to those maintained by the two existing coastal water carriers, Sea-Land Service, Inc. and Seatrain Service, Inc.;

3. That the reduced TOFC rates at issue apply only from and to points effectively served by the

coastal water carriers and that rates to and from other points have not been reduced;

4. That the water carrier services are inferior to the rail TOFC service and the water carriers cannot compete at equal rates with the rail TOFC services;

5. That the reduced TOFC rates at issue cover the railroads' out-of-pocket costs in all instances and their fully distributed costs in many instances;

6. That with respect to the particular 66 TOFC rates at issue, Sea-Land Service is in the great majority of cases the "low cost" carrier;

7. That the reduced TOFC rates at issue are part of a program of rail rate reductions which threaten the continued existence of the coastal water carriers.

The railroads contended that the enactment of Section 15a(3) of the Interstate Commerce Act has established a "new rule of rate making" under which the Commission is required to permit reduced competitive rates upon a showing that they exceed out-of-pocket costs unless (1) the competing modes are already in the throes of a destructive rate war or unless (2) it can be shown that the high cost mode has the specific intent to destroy the low cost mode.

The rationale of the report of the majority of the Commission may be summarized as follows:

1. The maintenance of domestic coastwise shipping is in the national interest and required by the national defense, as the Commission and Congress have found;

2. If the domestic coastwise industry is to attract traffic it must be permitted to assess rates lower than those via railroad; the record shows that the industry must maintain rates 6 per cent below the competitive rail TOFC rates in order to participate in the traffic;

3. If the domestic coastwise industry is to survive it must on an overall basis recover its full costs of operation;

4. The proposed reduced railroad TOFC rates under consideration, which accord the water carriers no rate differential, are an initial step in an overall program of rate reductions that threaten the continued operation of the coastwise carrier industry;

5. Therefore, in the premises, the proposed reduced railroad TOFC rates are unreasonably low, and competitively destructive, to the extent that they are below a level 6 per cent higher than the present water carrier rates.

The Commission also found, with no dissents on the point, that the Pan-Atlantic service is the low-cost service vis-a-vis TOFC.

In practical effect the court below holds that under the provisions of Section 15a(3) of the Interstate Commerce Act the Commission may not condemn a reduced railroad rate that returns fully distributed costs unless it is found that the competing water carrier services are "in general" the low cost mode and that value of service considerations demand water carrier rates on particular movements which each return to the water carriers more than their fully dis-

tributed costs; and unless as to the particular movements involved the water carrier is the low cost carrier, on a fully distributed cost basis.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This is a case of first impression. It is understood to be the first occasion that this Court has been asked to construe the provisions of subsection 15a(3) of the Interstate Commerce Act (49 USC 15a(3)), the so-called "rate making rule" enacted by the Congress in 1958. The proper construction of this subsection has been, and is, the subject of substantial controversy between the railroads on the one hand and other carrier modes on the other. Basically the question is whether or not as claimed by the railroads, including the appellees here, this subsection effects a radical change in the rate making rules and standards of the Interstate Commerce Act and supersedes the application of all other rules or standards in proceedings where intermodal rate relationships are involved. The railroads contend that it does, and that the Interstate Commerce Commission is substantially restricted by this subsection in its power to condemn as unreasonable and unlawful rates reduced to meet the competition of another mode of carriage. The appellant water carriers and the Government contend, on the other hand, that subsection 15a(3) merely supplements and complements the other rate making rules and standards set forth in the Act, and that it must be considered in conjunction therewith and with the National Transportation Policy, which is specifically referred to therein.

Upon the resolution of this controversy depends the future of what remains of the domestic coastwise water

carrier industry; upon it will no doubt hang the question of whether this industry will survive or perish.

1. The Court below errs in holding that the Interstate Commerce Commission is compelled to decide intermodal rate contests solely on the basis of relative carrier costs.

In its role as regulator of the rate making activities of the various forms of transportation subject to its jurisdiction the Commission has the task of accommodating its regulatory functions not only to each of the provisions of the Interstate Commerce Act but also to the statements of policy set forth in the National Transportation Policy. That policy calls in part for the administration of the Act so as to recognize and preserve the inherent advantages of each carrier mode; to promote adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preference or advantages, or unfair or destructive competitive practices—"all to the end of developing, co-ordinating and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States * * * and of the national defense." The policy specifically provides that "All of the provisions of this act shall be administered and enforced with the view to carrying out the above declaration of policy."

In its implementation of the rate making provisions of the Act, the Commission is called upon to exercise a high degree of expertise. *Virginian Ry. v. United*

States, 272 U.S. 658, 665-6. In the area of intermodal rates, for example, it must carefully weigh in the balance the interests of the various carriers involved, and of the shipping public. It must determine what standards to apply, and which to emphasize, in determining the reasonableness and lawfulness of carrier rates.

The traditional rate making standards or criteria that have evolved over the years of Commission regulation are several. One of the oldest is so-called "value of service." Value of service, as a valid rule of rate making, was recognized by this Court in *B & O Railroad Co. v. U. S.*, 345 U.S. 146.

Competitive need for rate reductions is another factor that has traditionally been considered, among others, in the Commission's determination of the reasonableness and lawfulness of reduced carrier rates. Competitive need takes into account the relative worth or value of the services to the shipping public, the less valuable service usually requiring some rate incentive in order to compete for the traffic. Traditionally water carrier service, being less frequent and slower than the railroad service, has required differentially lower rates in order to be competitive, as the Commission has found in its report here at issue. See also *Liquefied Petroleum Gas, Cincinnati, Ohio, and Ludlow, Ky.*, 284 I.C.C. 445, 559.

"Cost of service" is another of the traditional standards applied by the Commission in its adjudication of rate proceedings. Rates which do not return at least something in excess of the publishing carrier's out-of-pocket costs are generally found unlawful on the theory that the maintenance of rates on a lower

basis would be inimical to the interests of the carriers, the shippers and to the public welfare. Although *relative* carrier costs have been given consideration in rate making in proper cases, never has the Commission held relative costs to be the sole, or even the primary, measure of lawful rate relationships. As the Commission stated in *Class Rate Investigation, 1939*, 262 I.C.C. 447, 693 "neither do they (relative costs) control the contours of rate sales or fix the relations between rates or between rate scales. Other factors along with cost must be considered and given due weight in these aspects of rate making."

It appears to be the basic philosophy of the court below that the last named standard of rate making, "relative cost", has become the controlling, if not the sole, standard for invocation by the Commission in intermodal rate controversies since the enactment of Section 15a(3) of the Interstate Commerce Act in 1958. Although giving lip service to other standards, such as value of service, the court nevertheless makes it clear that as it reads that subsection of the Act no carrier shall be foreclosed from reducing its rates to compensatory levels to meet the competition of a carrier of another mode unless the other carrier has "in general" lower costs, and also lower costs on the particular traffic involved. We submit that Section 15a(3), particularly when read in the context of its legislative history, permits of no such interpretation.

Section 15a(3) provides in essential part that rates of a carrier should not be held up to a particular level to protect the traffic of any other mode of transportation "giving due consideration to the objectives of the national transportation policy declared in this Act." As noted one of the objectives of the national trans-

portation policy is the prevention of unfair or destructive competitive practices.

The Commission found in the report under consideration that the rates at issue were published to apply only between points served by the protestant water carriers; that they would deprive these water carriers of the ability to participate in the traffic; that they were an initial step in a program that, if unchecked, will lead to the extinction of the competing water carrier industry; that the publication of the railroad rates at issue constitutes destructive competition. The Commission in these circumstances properly heeded the injunction of the National Transportation Policy, as well as other relevant provisions of the act, and found the proposed rail rates unjust and unreasonable. As this Court pointed out in *New York v. United States*, 331 U.S. 284, 346:

“These cases, to be sure, recognize the power of the Commission so to fix minimum rates as to keep in competitive balance the various types of carriers and to prevent ruinous rate wars between them. That plainly is one of the objectives of the Act, and one of the reasons why the Commission was granted the power to fix minimum rates by the Transportation Act of 1920.”

The holding of the district court that Section 15a(3) has completely divested the Commission of discretion in intermodal rate controversies, and of the right to exercise its discretionary power to control destructive competition between carriers of different modes, is clearly in error.

2. The lower court has failed to give consideration to the economic and military importance of the coast-

wise water carrier services, as evidenced by the legislative as well as the executive branches of the government.

By a series of findings that have not been challenged the Commission concluded that the end result of the effectiveness of the reduced rail rates at issue would be the probable extinction of coastwise water services. (313 I.C.C. 47) The Commission recognized a legislative intent to foster and preserve these services, when efficiently operated, if necessary through the allowance of differentials under the competing rail modes to compensate for service inferiority (49 US 907(f); 905(c); 907(d)) (313 ICC at 49). The Commission further recognized Congressional and other authoritative expressions concerning the primary importance of domestic coastwise service to the national defense as well as to the national economy (313 ICC at 47, 48).

But the lower court deprecates the Commission reliance upon the "national defense" clause of the National Transportation Policy, holding that this is a "hoped for" end and is not stated "as an operative policy or means." The court held that even if the national defense portion of the Policy were deemed to conflict with other portions thereof "we think it not proper to disregard the more recent expressions of Congressional intent contained in Section 15a(3)." Moreover the court minimized the importance of expressions by the U. S. Maritime Administration and of a Senate committee with respect to the importance of coastal shipping to the national defense, on the ground that these expressions were made in the past and have not resulted in legislation; that "whatever its relevance in 1950 it (the Senate report) must yield to the specifications of the 1958 Act" (p. 23).

The court below, with respect to the shipper evidence before the Commission indicative of a need by the general public for the service of the coastwise water carriers, held that should the Commission "heed the statute and allow the reduction (in rail rates) any need for these services may well disappear."

We submit that in ignoring the plain legislative intent to foster and preserve efficiently operated domestic coastwise water services in the public interest, and to protect those services from competition that will destroy them, the lower court has erred.

3. The court below erred in ignoring the statutory burden of proof that rested with the railroads.

Under the provisions of 49 USC § 15(7) "the burden of proof shall be on the carrier (who seeks a rate change) to show that the proposed changed rate * * * is just and reasonable." If as the court below appears to hold, relative costs are to be the controlling consideration here, then a part of the railroads' burden of proof is showing that they, the railroads, are in fact the low cost carriers vis-a-vis the protesting water carriers. The court holds, however, that "it is for the protestant to show its costs" in these circumstances. Protestant Sea-Land did in fact show its costs with respect to all of the competitive movements involved, showing that it is in virtually all instances low cost, and the apparent holding of the court to the contrary is in error.

At all events, if in fact proposed reduced carrier rates published under the circumstances obtaining here need be justified on the ground that the publishing carriers are the low cost mode, clearly the establishment of that fact is part and parcel of the statutory burden

of proof. The court below erred in shifting that burden to the protesting water carriers.

To summarize, in net effect this Court will be called upon to decide whether the enactment in 1958 of Section 15a(3) of the Interstate Commerce Act compels the Commission to approve selective, and substantial, competitive rate reductions by the railroads the end result of which will probably be the elimination of another carrier mode, i.e., the coastal water carriers, absent a finding that the latter are the low cost carriers, in general as well as with respect to the particular rates at issue.

The Court below has held that under the provisions of Section 15a(3) relative carrier cost is controlling in intermodal rate controversies; that the lower cost mode ("in general" and particularly) is entitled to the lower rates, irrespective of the relative values of the respective services, irrespective of whether or not the application of this principle will spell the extinction of the higher cost mode, and irrespective of the provisions of the National Transportation Policy calling for the preservation of water carrier services and enjoining against destructive competition in rate making. The court below would thus relegate the Commission to the role of a computer of costs in the performance of its intermodal rate making functions. The "flexibility in rate making," the need for which was emphasized by this Court in *Baltimore & Ohio, supra*, would thus disappear. Granted that Section 15a(3) may have changed the emphasis in intermodal rate making so that carrier costs should be given more weight than in the past, it is nevertheless submitted

that this subsection does not make relative cost the sole consideration, as its legislative history plainly reveals and as the Commission has properly recognized.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance, and it is urged that jurisdiction be noted, and that the decree of the court below be reversed in respect to the issues and the questions raised by this appeal.

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May 8, 1962

APPENDIX**National Transportation Policy [49 U.S.C., Preceding
§§ 1, 301, 901, and 1001]**

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Sec. 15a(3) [49 U.S.C. 15a(3)]

"In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

Section 15(7) [49 U. S. C., § 15]

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding had not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund,

with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

SEATRAN LINES, INC.,

Appellant,

v.

NEW YORK, NEW HAVEN and HARTFORD
RAILROAD COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT.

JURISDICTIONAL STATEMENT.

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Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT.**

JURISDICTIONAL STATEMENT.

This appeal is filed on behalf of Seatrain Lines, Inc. The appellant will hereinafter be referred to as "Seatrain."

Opinions Below.

The opinion of the United States District Court for the District of Connecticut, decided November 15, 1961, is reported in 199 F. Supp. 635 (D. Conn. 1961), and is attached as Appendix A. The final judgment of the district court, dated January 8, 1962, is attached hereto as Appendix B. The decision of the Interstate Commerce Commission,

decided December 19, 1960, is reported in 313 I. C. C. 23, and is attached as Appendix C.

Jurisdiction.

This action was brought under 49 U. S. C. §17(9); 28 U. S. C. §§1336, 1398, 2284, 2321-2325, inclusive; and 5 U. S. C. §1009, to enjoin and set aside an order of the Interstate Commerce Commission. The decree of the three-judge district court was entered on January 8, 1962. The United States of America, the Interstate Commerce Commission, Seatrains Lines, Inc. and Sea-Land Service, Inc. filed notices of appeal in that court on March 9, 1962.

The jurisdiction of this Court to review the judgment and decision of the district court by direct appeal is conferred by 28 U. S. C. §§1253 and 2101(b).

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case; *United States v. Capital Transit Company*, 325 U. S. 357 (1945); *Alabama Great Southern Railroad Co. v. United States*, 340 U. S. 216 (1951); and *United States v. Drum*, 368 U. S. 360 (1962).

Statutes Involved.

The following statutes are involved: The National Transportation Policy (49 U. S. C. preceding §§1, 301, 901, and 1001) and Sections 15(1), 15(7), 15a, 305(c) and 307(d) of the Interstate Commerce Act (49 U. S. C. §§15(1), 15(7), 15a, 905(c) and 907(d)). The foregoing statutes are set forth in Appendix D attached.

Questions Presented.

The questions presented by this appeal are as follows:

1. Whether in determining the reasonableness of drastically reduced rail rates, which are limited to points served by water carriers and which are designed to divert traffic from regulated common carriers by water, the Interstate Commerce Commission is required to place exclusive reliance on the costs of the competitive rail and water services?

2. Whether Section 15a(3) of the Interstate Commerce Act, as added to that Act in 1958, made a major modification in the National Transportation Policy, so as to make costs of providing service the principal, if not the exclusive, criterion, by which the lawfulness of competitive rate reductions must be determined?

3. Whether the Interstate Commerce Commission's findings that certain reduced railroad trailer-on-flat-car rates would preclude the coastwise water carriers from competing at equal rates with the railroads' service, would result in a vicious cycle of rate cutting and would threaten the continued existence of the coastwise water carrier industry generally and its further findings that coastwise shipping is important for national defense purposes and is an important and essential part of a national transportation system adequate to meet the needs of the commerce of the United States justify the conclusion of the Commission that the appellee railroads failed to sustain their statutory burden of proof 'that the proposed changed rate . . . is just and reasonable' under Section 15(7) of the Interstate Commerce Act?

Statement.

The order of the Interstate Commerce Commission, which is under review in this action, directed the cancellation of some 66 of appellees' drastically reduced trailer-on-flat-car (TOFC or "piggy back") rates on various commodities between eastern points, on the one hand, and Dallas and Fort Worth, Texas, on the other hand. Appellees' rates were selective in that they were limited to points served by water carriers now operating in the Atlantic-Gulf trade, namely Seatrain Lines, Inc. and Sea-Land Service, Inc. (referred to in the Commission's reports below under its former name, Pan-Atlantic Steamship Corporation) and were designed to divert traffic from Seatrain and Sea-Land.

Seatrain is a common carrier by water certificated by the Interstate Commerce Commission for transportation of commodities generally between the port of New York and the Gulf ports of New Orleans, La., and Texas City, Texas and between the ports of New York and Savannah, Ga. Seatrain's service consists of transporting freight in railroad cars on its ocean going vessels. The railroad cars move to the dockside of Seatrain's vessels, are lifted on to them and are moved by water between the ports served by Seatrain. At the port of destination, the rail cars are removed from Seatrain's vessels and then proceed by rail to the consignee. Seatrain's service is commonly known as a rail-water-rail, non-break-bulk service.*

Sea-Land's water operations are substantially similar to those of Seatrain, except that Sea-Land's vessels carry demountable highway trailers instead of rail boxcars. Sea-Land's service is commonly known as a motor-water-motor,

* Its operations have been the subject of litigation before this Court in *United States v. Pennsylvania R. Co.*, 323 U. S. 612 (1945).

non-break-bulk service, sometimes described as "fishy back" service.

The railroad appellees' TOFC service is a non-break-bulk motor-rail-motor service, wherein goods are transported by highway trailer over the road, are then transported on rail flatcars in the same trailers over the rails and subsequently proceed in the same trailer over the road to their ultimate destination. TOFC or "piggy back" service was not provided in any substantial volume by the appellees until recent years.

Prior to 1957 the rates set for TOFC service were generally on a parity with those in force for motor carrier service and somewhat higher than all rail boxcar service. All rail boxcar rates were maintained at higher levels than water rates and combination water-rail and water-motor rates. Such a rate structure was attributable to the lower cost of water service and the disabilities of that service, which resulted from the infrequency of sailings, longer transit time and perils of the sea.

Because of these disabilities it has been impossible for Seatrain to attract any traffic at equal rates to all rail boxcar service, and the Commission has repeatedly found that all rail boxcar service is superior to Seatrain's service. *Wrought Pipe and Fittings*, 234 I. C. C. 347, 391 (1939); *Liquor From North Atlantic Ports to Savannah*, 289 I. C. C. 104, 105 (1953); *Iron and Steel from Edgewater, N. J. to Savannah, Ga.*, 294 I. C. C. 411, 417-419 (1955). TOFC service is admittedly superior to all rail boxcar service; and it necessarily follows then that TOFC service is superior to Seatrain's service.

In 1957 appellee railroads filed schedules for their TOFC service which were substantially on a parity with the rates of Seatrain and Sea-Land. In connection with such

schedules the appellees also applied to the Commission for relief from the provisions of Section 4(1) of the Act (49 U. S. C. §4(1)) since their proposed reduced TOFC rates would result in higher rates between intermediate points in shorter hauls than in the longer hauls between East Coast and Texas points in violation of Section 4(1) of the Act.

The proposed reduced TOFC rates and the fourth section application were opposed by Seatrain, Sea-Land, a motor carrier association, the Secretary of Agriculture and several municipal authorities.

The rates were suspended and placed under investigation in the Commission's I & S. Docket No. 6834 *Piggy-Back Rates—Between East and Texas*. On December 19, 1960 the Commission issued its decision on the proposed reduced TOFC rates (313 I. C. C. 23, App. C)* and ordered that the proposed rates be cancelled on the ground that they were not shown to be just and reasonable. Fourth section relief was also denied.

In support of its conclusion that appellees' reduced TOFC rates were unjust and unreasonable the Commission made numerous basic and essential findings of fact. It found that the services of the water carriers, particularly that of Seatrain's, were inferior to the TOFC services (App. C, pp. 47-49), that in order to attract traffic the water carriers were required to establish rates somewhat below those of the rail carriers in competitive markets (*id.* at 56) and that the proposed TOFC rates, which would be substantially on a parity with water carrier rates, would precipitate a vicious and destructive cycle of rate cutting (*id.* at 51).

* This is a consolidated decision involving numerous dockets including I. & S. No. 6834, *Piggy-Back Rates—Between East and Texas*, wherein the proposed rates were suspended and I. & S. Docket No. M-10415, *Commodities—Pan-Atlantic Steamship Corporation*, the docket wherein the proposed rates were cancelled.

It further found that the "reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence of the coastwise water-carrier industry generally" (*id.* at 59).

The Commission pointed out the serious decline of coastwise shipping, its importance to the national defense and its general public use as an integral part of the national transportation system (*id.* at 59-61).

The Commission also considered the cost factor. While it found the proposed TOFC rates to be compensatory,* with but few exceptions not now in issue, it also found sea-land costs to be below TOFC costs with but two exceptions (App. C, p. 58). The Commission, however, pointed out that cost was only one of the elements to be considered in evaluating the lawfulness of rates and that in the exceptional circumstances of this case, which were detailed in its findings, the objectives of the National Transportation Policy required the establishment and maintenance of a differential relationship between the proposed TOFC rates and those of Seatrail and Sea-Land, so as to permit the water-carriers to continue their efficient and economical coastwise service (*id.* at 63).**

On February 2, 1961, appellee railroads brought an action in the district court below to enjoin and set aside so much of the Commission's order as required the cancella-

* The Commission considered the rates to be compensatory, so long as they equalled or exceeded out of pocket costs. A substantial number of the rates, however, did not equal or exceed fully distributed costs.

** The Commission stated that in its judgment the proposed TOFC rates should be maintained on a level no lower than 6 percent above Sea-Land's rates, so long as the latter are not increased above present levels (App. C, p. 63).

tion of the TOFC rates. Seatrain and Sea-Land intervened in defense of the order. On November 15, 1961, the district court rendered its opinion (App. A, pp. 1-23), holding that the order requiring the cancellation of the TOFC rates be set aside and that the Commission should be enjoined from cancelling those TOFC rates which would return at least the fully-distributed costs of carriage. The district court's judgment (App. B, pp. 24-25) was entered on January 8, 1962.

The basis for the district court's action was its belief that the Commission had improperly held up the TOFC rate level to protect the traffic of another mode of transportation, i. e., the water carriers in violation of Section 15a(3) of the Act. Such rate differentials cannot be maintained, according to the district court, unless the water carriers would be destroyed as a result of the rail carriers "setting rates so low as to be hurtful to [themselves] as well as [their] competitor or so low as to deprive the competitor of the 'inherent advantage' of being the low-cost carrier" (App. A, p. 12). Thus TOFC rates, yielding the railroads' fully distributed costs, absent what the court claimed was a showing that water carrier service was the overall low-cost mode, could not be cancelled. However, TOFC rates, failing to return fully distributed costs, could be cancelled.

The Court rejected the Commission's contention that factors, other than the costs of rail and water service, and which are embodied in the National Transportation Policy compelled cancellation of the proposed TOFC rates. The Court stated that this contention was not supported by the evidence or the findings.

The Questions Are Substantial.

The questions presented by this appeal are of substantial importance to the Commission's administration of the Interstate Commerce Act and its regulation of intermodal forms of transportation under its jurisdiction. And they are of vital economic significance to the domestic coastwise water carrier industry which has been suffering a drastic decline in its traffic.*

The district court's reliance upon and its interpretation of Section 15a(3) overturn 40 years of congressional mandates, administrative interpretations and judicial precedents, including those of this Court, on the need for protecting water carriers against selective and destructive rate cutting by the rail carriers. The decision, if permitted to stand, can only eventually result in the complete elimination of coastwise water service.

Simply stated the district court's decision holds that in evaluating the reasonableness of competitive rate reductions the costs of providing the service are the controlling, if not the exclusive, factor upon which the Commission must rely. By its decision the Court would emasculate the National Transportation Policy by having the Commission give no heed to such other important considerations as the promotion of safe, adequate, economical and efficient service; the fostering of sound economic conditions in transportation and among the several carriers; the proscription of unfair or destructive competitive practices; and the public need for and national defense importance of a particular mode

* See Hearings before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Interstate and Foreign Commerce on the decline in the position of the Coastwise and Intercoastal Shipping Industry of the United States, 86 Cong. 2d Sess. (1960).

of transportation, in this case the coastwise water carriers. These were the factors upon which the Commission rested its decision in finding that the appellees had failed to establish the lawfulness and reasonableness of the proposed TOFC rates under Section 15(7) of the Act.

At the core of the district court's decision is its belief that Section 15a(3), as added to the Act in 1958, modified the National Transportation Policy to such a major extent that it made the cost of providing the service the controlling determinant on the reasonableness of competitive rate reductions. Section 15a(3) did no such thing.

For over forty years the law has recognized the economic need to control selective rail rate reductions aimed at water carriers. The Transportation Act of 1920 stated the intent of Congress that water transportation be fostered along with rail transportation (Transportation Act of 1920, Section 500, now incorporated in 49 U. S. C. §142).

The Transportation Act of 1940 reaffirmed the Congressional condemnation of selective rate reductions aimed at water carriers and expanded the Commission's duty to prevent destructive competition. *Eastern-Central Motor Carriers Association v. United States*, 321 U. S. 194, 206 (1944); *Interstate Commerce Commission v. Mechling*, 330 U. S. 567 (1947). It "was recognized in the debates on the bill that became the Transportation Act of 1940 that manipulation of rail rates downward might deprive water carriers of their 'inherent advantages' and therefore violate the Act. It was emphasized that one of the evils to be remedied was cutthroat competition, whereby strong rail carriers would reduce their rates, putting water carriers out of business." *Dixie Carriers, Inc. v. United States*, 351 U. S. 56, 59-60 (1956).

The contention that costs are the controlling factor in rate making has been consistently rejected by the Commis-

sion and this Court. *Alabama Great Southern Railroad Co. v. United States*, 340 U. S. 216, 223 (1951). And the right of the Commission to condemn rates as destructive of a sound national transportation system, even though compensatory, has been upheld by this Court in *New York v. United States*, 331 U. S. 284 (1947). Against this back-drop of long historical precedents and sound economic transportation policy, Section 15a(3) was adopted in 1958.

Section 15a(3) has a long and controversial legislative history, which began in 1955 with the introduction of H. R. 6141.* That bill proposed a fundamental reversal of the National Transportation Policy, calling for greatly increased reliance on competitive freedom in ratemaking.

The proposed legislation provided a new National Transportation Policy which eliminated any reference to "unfair or destructive competitive practices" and embodied a completely new ratemaking rule, commonly referred to as the "three shall nots," because it forbade the Commission in determining the validity of proposed rates from considering (1) "the effect of such charge on the traffic of any other mode of transportation"; (2) "the relation of such charge to the charge of any other mode of transportation;" and (3) "whether such charge is lower than necessary to meet the competition of any other mode of transportation." These proposed changes were championed by the railroads, but opposed by the Commission, motor carriers and water carriers.

While the district court's decision reads as if the revolutionary "three shall nots" rule was passed into law, it was not. Nothing like it was passed. On the contrary, Congress

* Proposed as Section 15a(1) in H. R. 6141, 84th Cong., 1st Sess. and printed in Hearings before the Subcommittee on Transportation Policy of the House Committee on Interstate Commerce, 84th Cong., 2d Sess., April 24, 1956, pp. 1-6.

reaffirmed the obligation of the Commission to give "due consideration to the objectives of the national transportation policy declared in this Act" in passing the present Section 15a(3), which provides as follows:

"In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, *giving due consideration to the objectives of the national transportation policy declared in this Act.*" (Emphasis supplied.)

In support of its decision the district court has seized upon one portion of the statutory language in Section 15a(3), i. e., "Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation" and has completely ignored the Congressional condition attached to that language, i. e., "*giving due consideration to the objectives of the national transportation policy declared in this Act.*"

The provision that "Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation" was adopted to meet the complaints by the rail carriers that the Commission was arbitrarily holding up rate levels of proven low-cost carriers solely to protect the traffic and rate structure of another higher cost mode of transportation, without regard to service disabilities, the competitive positions of the carriers or the impact of such rates upon the national transporta-

tion system.* No such rate practices are involved in this case. Among other things the Commission found, as was pointed out previously, that TOFC costs were generally higher than sea-land costs, that TOFC service was superior to the services of the water carriers, that the TOFC rates would cause a cyclical rate war, resulting in the elimination of the coastwise water service, to the detriment of the national defense and the public need.

The provision that due consideration shall be given by the Commission to the objectives of the National Transportation Policy when evaluating the reasonableness of competitive rate reductions vindicated those, including the Commission, who had fought for three years against the adoption of the "three shall nots" rule of ratemaking. The Commission in this case has given due consideration to the objectives of the National Transportation Policy as its findings, which we have summarized, *supra*, pp. 6-7, amply demonstrate. Unfortunately, the district court with its reliance upon costs to the exclusion of the other National Transportation Policy considerations, has not.

Conclusion.

For the reasons heretofore stated, we believe that the questions presented by this appeal are substantial and are of such public importance so as to require plenary con-

* The Commission insisted throughout the legislative hearings that it never followed such a course of conduct.

sideration, with briefs on the merits and oral argument,
for their resolution.

Respectfully submitted,

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May 8, 1962.

Appendix A.

IN THE

United States District Court

FOR THE DISTRICT OF CONNECTICUT.

CIVIL ACTION No. 8679.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE
COMMISSION,

Defendants,

SEA-LAND SERVICE, INC., and SEATRAN LINES, INC.,
Defendants-Intervenors.

Before HINCKS, Circuit Judge, and ANDERSON and
TIMBERS, District Judges.

HINCKS, Circuit Judge.

This is an action brought by several railroads to enjoin an order of the Interstate Commerce Commission, entered pursuant to a report¹ published in 313 I. C. C. 23, directing them to cancel substantial rate reductions for 66 listed movements of their trailer-on-flat-car (TOFC) service between points in the East and Texas. Two water carriers, Sea-Land Service, Inc. (hereinafter referred to as Sea-Land), and Seatrain Lines, Inc. (hereinafter Seatrain),

¹ References in this opinion to the report will employ the pagination of 313 I. C. C., thus : "R. 1 (2, 3, etc.)."

protested the proposed rates and appeared herein to defend the order below. The United States and the Interstate Commerce Commission also appeared herein and defended the order. They will be referred to collectively as "the government."

Sea-Land, known in the proceedings before the Commission by its former name Pan-Atlantic Steamship Corporation, in 1957 had suspended its domestic break-bulk freight service, theretofore operated between eastern ports and Southern Atlantic and Gulf ports. It substituted four "trailer-ships," each of a capacity to carry 226 standard, demountable, truck trailer-bodies, and each equipped with cranes capable of lifting the loaded trailers from their chassis on the pier, stowing them aboard, unopened, into cooperating slots and, at the ports of destination, lifting them onto trailer-chassis on the pier. By this improved highway-water-highway "fishy-back" service, Sea-Land offered a door-to-door service to all shippers and consignees accessible by highway in containers locked or unopened between the point of origin and destination. The conversion from break-bulk service to the "fishy back" service just described enabled Sea-Land to improve the quality of its service and reduce operating costs at rates which, prior to 1957, were five to ten per cent below the rail boxcar rates.

Seatrains offers rail-water-rail service whereby loaded railroad cars are taken aboard its three steamships at Edgewater, New Jersey and after carriage by sea to a destination in a southern coast or a Gulf port are then carried by a railroad for delivery to the consignee. Seatrain contemplates a modification of this service, a so-called "seamobile service," whereby the freight will be carried in special containers which may be readily transferred from highway trailers or railcars to and from its seagoing vessels. Like railroad boxcar service, the present Seatrain service permits carriage from shipper to consignee without breaking bulk only when shipper and consignee are located on railroad sidings.

To compete with these services and especially that of Sea-Land which is available to shippers and consignees without rail access, the railroads considerably extended their "piggy-back," highway-rail-highway, service, whereby trailer-bodies, without detachment from their chassis, are hauled onto and tied down upon railroad flatcars, one or two to each flatcar, and at the rail destination are hauled by tractors to the consignees' doors. Prior to 1957 the rates set for this TOFC service were generally on a parity with those in force for regulated motor-carrier service and somewhat higher than the rail boxcar rates. But to make their competition with Sea-Land's fishy-back service more successful, the railroads in 1957 filed rate schedules for their TOFC service which were substantially on a parity with Sea-Land and Seatrain rates, R. 33, and motor common carrier rates, R. 45. However, these rate schedules, since inaugurated as an experiment, were limited to 66 commodity movements from particular eastern points to Fort Worth and Dallas and return.

On petitions of Sea-Land, Seatrain, a motor-carrier association, the Secretary of Agriculture, and several municipal authorities, the Commission placed all the TOFC rates in this initial, or pilot, schedule under suspension and investigation under I. & S. Docket No. 6834—"Piggy-back Rates—Between East and Texas," which also covered the lawfulness of Sea-Land rates between the same points and certain Seatrain rates. This controversy, together with three others involving the lawfulness of numerous other Sea-Land rates, each under separate docket numbers, I. & S. Docket No. M-10415, I. & S. Docket No. 6906, and I. & S. Docket No. M-11375, came on for hearing before Examiner Morgan who filed a separate report on each. On exceptions by the parties, No. M-10415 was heard by Division 3 of the Commission and on further exceptions by the railroads to the Division 3 report all four docket numbers were consolidated for hearing and dealt with in a consolidated report² by the entire Commission.

² This report embraced 43 docket proceedings.

The Commission held³ that the entire schedule of TOFC rates was unlawful and, in the order under attack herein, directed that the rates, which had theretofore been under suspension, be canceled. The cancellation date, however, was ordered suspended, thus leaving the rates in continuing suspension. It was to set aside the cancellation order as to the TOFC schedule that the railroads brought this action. Except for a few specific rates, the Sea-Land and Seatrain rates were found lawful and to this holding no exception had been taken to the Division 3 report.

The Commission's essential findings as enunciated by five of the Commissioners in its report were as follows:

1. The proposed TOFC rates would produce revenues exceeding out-of-pocket costs (see Appendix A, *infra*) for all of the proposed movements by TTX flatcars⁴ and for all but six of 66 of the listed movements by railroad-owned cars,⁵ and exceeding the railroads' fully-distributed costs (see Appendix A) for 43 of the 66 movements by TTX cars and 14 movements by railroad-owned cars. R. 36. Consequently, except for the six rates returning less than *out-of-pocket* costs⁶ the TOFC rates were found to be compensa-

³ Its report was adhered to by five Commissioners. Commissioner Hutchinson concurred on the ground that the proposed schedule constituted a destructive competitive practice. Commissioner Freas, in a dissenting report in which Chairman Winchell and Commissioner Webb joined, dissented on the ground that the Interstate Commerce Act as amended neither required nor permitted "blanket protection for the water carriers." Commissioner McPherson, concurring in part, said: "I would approve all the rates which are compensatory but on this record I would not impose any differential." Only ten Commissioners were then in office.

⁴ Flatcars on lease by the railroads capable of carrying two trailers.

⁵ The conventional railroad-owned cars are generally capable of carrying only one trailer. As the Commission observed, the choice between 1 or 2-trailer cars "would rest entirely with the railroads."

⁶ These six rates the railroads withdrew and they are not in issue in this litigation.

tory.⁷ The corresponding Sea-Land rates, with one exception, were similarly found to be compensatory, as were the Seatrain rates.

2. As to the 66 movements in issue here, Sea-Land costs, both on an out-of-pocket and a fully-distributed basis, were lower than TOFC costs except for two (out of the 66) movements accomplished by TTX cars. However, railroad box-car costs on some of this traffic were lower than Sea-Land costs; on other portions of the traffic, Sea-Land costs were lower. On the record before it the Commission said it "can not determine . . . where the inherent advantages may lie as to any of the rates in issue."⁸ R. 46.

3. In quality of service, the several modes rated in the following order: TOFC, all-rail boxcar, Sea-Land and Seatrain. However, "the most important, and usually the determinative, factor to the shippers as a whole is the measure of the rates."⁹ R. 29.

4. All Sea-Land traffic is competitive with the railroads. But only a fraction of railroad traffic is competitive with Sea-Land. R. 45.

5. The railroads intend, if the proposed TOFC rates attract profitable traffic, to extend the reductions in TOFC rates to many other movements than the 66 immediately involved herein. R. 47.

⁷ The report makes it plain that the Commission considered that rates yielding in excess of out-of-pocket costs were "compensatory."

⁸ The Commission pointed out that both the TOFC and the Sea-Land service were subject to certain variables not measurable in the record before it.

⁹ The Commission, after describing the various competing services, concluded that "the preponderance of the testimony on these records is to the effect that most of the shippers prefer rail service to sea-land except at lower rates for the latter." This, obviously, indicates recognition of some quality-of-service superiority in dependability and speed for overland as against water transport. R. 44. See also R. 38-40.

6. Sea-Land must recover fully-distributed costs to remain in business. R. 38.

On conclusions thought to follow from these findings, the Commission ordered the proposed TOFC rates cancelled, holding that "the rail TOFC rates on the commodities from and to the points concerned in I. & S. No. 6834 should be maintained on a level ~~no~~ lower than 6 percent above . . . sea-land rates, so long as the latter are not increased above their present levels." And its order was expressly stated to be "without prejudice to the filing of new schedules in conformity with the conclusions herein." R. 50. (Emphasis supplied.)

We hold that, at least on this record, the requirement of a rate differential to protect the water carriers violated the 1958 Amendment to the Interstate Commerce Act, now appearing as 49 U.S.C.A. § 15a(3), which reads as follows:

"In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

In disapproving the proposed schedule of the railroads the Commission, contrary to the specific prohibition of the 1958 amendment, is plainly holding up railroad rates "to protect the traffic" of another mode. It argues, however, that the national transportation policy (hereinafter sometimes referred to as NTP),¹⁰ to which it is commanded to give

¹⁰ The Congressional declaration of the National Transportation Policy was introduced into the Interstate Commerce Act by the Transportation Act of 1940, 54 Stat. 899, and now appears in

"due consideration" by the same provision, compels this result. The evidence and findings do not support this argument.

The first policy-factor mentioned in the NTP declaration is to "recognize and preserve the inherent advantages of each [mode of transportation]." By "the inherent advantages" was meant the ability of a mode of transportation over the long run to provide a transportation service more acceptable to its shippers, by reason of quality or price, than that offered by a competing mode. That the calculation was to be long-run must be emphasized. The shorter-run "out-of-pocket" costs of one mode (e. g., railroads) may be lower than the longer-run "fully-distributed," or even the shorter-run costs of competing modes (e. g., water carriers) whose long-run costs are lower. When they are, rates set by reference to out-of-pocket costs may favor what in the long run is the less efficient, higher-cost mode. Thus the "inherent advantages" of lower cost (or better service, which is discounted for price) refers to the long-run, or fully-dis-

the United States Code Annotated preceding §§1, 301, 901, and 1001 of Title 49:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

tributed, costs of carriage.¹¹ It was thought undesirable that one mode should undercut the rates of a competing lower-cost mode. Such conduct savored of a predatory competitive practice. See *Dixie Carriers v. United States*, 351 U. S. 56, 59, and n. 5, 76 S.Ct. 578, 100 L.Ed. 934 (1956). And generally it was possible to destroy a lower-cost carrier or mode only by reducing rates, at least temporarily, to a level below the costs of either. It well may be that for the higher-cost mode to jeopardize the continued existence of a lower-cost mode by setting rates below the costs of each, could be characterized as a "destructive competitive practice" which under another NTP policy-factor was not to infect the "reasonable charges for transportation services" which the Commission was authorized to approve. But that is not this case, as we will now proceed to show.

¹¹ See *Dixie Carriers v. United States*, 351 U. S. 56, 59, 76 S. Ct. 578, 580, 100 L. Ed. 934 (1956) ("lower cost of equipment, operation, and therefore service"; Congress' fear was lowering of rates by "strong" carriers, putting more efficient carriers out of business, citing 84 Cong. Rec. 5874); Statements of Chairman Freas before the Senate Committee on Interstate and Foreign Commerce, Hearings on S. 3778, 85th Cong., 2d Sess. (1958) ("In many instances, however, the full cost of the low-cost form of transportation exceeds the out-of-pocket cost of another. If, then, we are required to accept the rates of the high cost carrier merely because they exceed its out-of-pocket costs, we see no way of preserving the inherent advantages of the low cost carrier."); Colloquy between Senators Kefauver and Smathers, 104 Cong. Rec. 10859 (1958) ("Mr. Kefauver: * * * Some people have expressed the belief that under [15a(3)] it would be possible for one type of carrier to lower its rate to such an extent that another carrier would not be able to compete fairly on the basis of charging the overhead to that other carrier. There is nothing in [15a(3)], is there, which would enable one carrier to take undue advantage of another carrier * * *?" "Mr. Smathers: No. The answer is no.")

It will be observed that Congress had very different ideas as to what out-of-pocket and fully-distributed costs are than did the Commission. If Congress had realized that "railroad operating expenses include virtually all important railroad costs except property taxes and interest payments," see Appendix A, *infra*, it might have acted differently. But that, of course, is not a matter for our decision.

The Commission in its report expressly admitted (R. 46) that "we can not determine on these records where the inherent advantages may lie as to any of the rates in issue." It thus made it plain that it did not rest its holding on the "inherent advantages" factor of the NTP. Instead, it turned to another NTP factor to justify its decision. It said, at R. 44, the "TOFC rates here under investigation, with the few exceptions noted, appear to be compensatory. Many of these are above the fully-distributed costs shown, and with the exceptions mentioned, all are above out-of-pocket costs. The next, and *the most important, question is whether these rates constitute destructive competition.*" (Emphasis supplied.) And that the Commission did, at least in part, base its decision upon a holding that the proposed TOFC rates were an "unfair or destructive competitive practice" such as it thought frowned upon by the NTP, is demonstrated by its statement that: "The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence, of the coast-wise water-carrier industry generally," R. 47. Apparently the Commission thought that any rate-competition which threatens the continued existence of a competitor it had power to prevent as a "destructive competitive practice," irrespective of whether the challenged rates were compensatory to the proponent thereof or whether the mode of the contesting competitor was a lower-cost mode than that of the proponent.¹² This, we hold, was an erroneous interpretation of the Act, as amended.

Even before 1958, it would have been erroneous to hold

¹² That the Commission considered itself vested with a power of such sweeping breadth is further demonstrated by its stated conclusion herein (R. 50) that the water carriers must be favored by a differential under railroad boxcar rates, albeit a somewhat smaller differential than the 6% differential required of TOFC rates. Yet as to boxcar costs the Commission had found only that on some of this traffic Sea-Land "is shown as the low-cost agency; on the other traffic, the railroads' costs appear to be lower." R. 46. This surely falls far short of a finding that Sea-Land's is the low-cost mode.

that irrespective of other factors rates were unlawful merely because they would destroy carriers operating under different modes of transportation. In *Schaffer Trans. Co. v. United States*, 355 U.S. 83, 91, 78 S.Ct. 173, 178, 2 L.Ed.2d 117 (1957), it was said that "[t]he ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of 'inherent advantage' that the congressional policy requires the Commission to recognize."

Prior to 1958, the Commission's emphasis as between different factors of the NTP had vacillated; now allowing rate reductions to "recognize and preserve . . . inherent advantages," see *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, and later shifting its stress to "coordinating . . . a national transportation system" even at the cost of stifling competition, as in *A. W. Schaffer Extension—Granite*, 63 M.C.C. 247, rev'd sub nom. *Schaffer Trans. Co. v. United States*, *supra*.

Against this background of vacillation, the Transportation Act of 1958 was adopted. We think that, on the whole, the amendment of Section 15a was intended to provide freer play for competition as between different modes while still continuing protection to the modes having the inherent advantage of low cost from unfair or destructive competitive practices. In this the Congressional history, while perhaps not conclusive, bears us out. In H. R. Rep. No. 1922, 85th Cong., 2d Sess. (1958), 2 U. S. Code Congressional and Administrative News, p. 3456, 3470 (1958), it had been said: ". . . the Interstate Commerce Commission has not been consistent in the past in allowing one or another of the several modes of transportation to assert their inherent advantages in the making of rates." This House Report on §15a(3) in its final form said, further: "The effect of this amendment will be to encourage competition between the different modes of transportation for the benefit of the shipping public." It quoted with approval the above excerpt from the opinion in *Schaffer Trans. Co. v. United States*, *supra*.

The report of the Senate Committee of June 3, 1958 (S. Rep. No. 1647, 85th Cong., 2d Sess.) said of §15a(3) in its final form,

"The committee wishes further to emphasize that the amendment in regard to section 5 amending section 15a of the act as framed by the committee is *designed to encourage competition* in transportation by allowing each form of transportation subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to offer, with such rate making being regulated by the Interstate Commerce Commission, however, to prevent 'unfair or destructive competitive practices' as contemplated by the declaration of national transportation policy. Under the committee amendment *the principal emphasis*, but not the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation *will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies.*" (Emphasis supplied)

Having in mind that by the 1958 amendment Congress for the first time articulated an express, though qualified, prohibition against holding up the rates of one mode to protect another, a prohibition accompanied by a direction that consideration shall be given to the effect of rates on the carrier for whom they are prescribed, we are unable to accept the contention in the government's brief that "section 15(a)(3) brought about no fundamental change in the law." We think that Congress in adopting the 1958 amendment, which its committees thought would encourage competition, did not intend the included prohibition of compulsory rate differentials to be nullified merely because of the adverse effect of rate competition on another mode of transportation even if carried to the point of rendering one mode of transportation obsolete and hence unable to survive. Instead, we think, the differential prohibition was

intended to be qualified only when factors other than the normal incidents of fair competition intervened, such as a practice which would destroy a competing mode of transportation by setting rates so low as to be hurtful to the proponent as well as his competitor or so low as to deprive the competitor of the "inherent advantage" of being the low-cost carrier. The "inherent advantage" factor and the "destructive competitive practice" factor were the only two policy factors mentioned in the committee reports. We think the reference to the NTP in §15a(3) indicates an intent that the differential prohibition was to be qualified only when necessary because of the interplay of these two factors.

We cannot help wondering if the Commission's obvious reluctance to accept as critical the relative costs of service by the competing modes of transportation may not be attributable less to its interpretation of the applicable law than to its fear that the process which it has developed of so-called value-of-service ratemaking will be jeopardized if it be required to make critical findings as to the comparative costs of competing modes of transportation.

Value-of-service ratemaking is a price-discrimination device, used either to maximize profit or to subsidize certain interests. As a maximizing tool, it can be used by a monopolist in the following way. M has a product—transportation—with two potential buyers, A and B. A uses it to ship industrial sand which he sells for \$10 a ton, B to ship coal which he sells for \$35 a ton; M's cost of shipment is the same for both. If he sets a uniform rate per ton of \$2, B will ship but A will not—he will not be able to meet his competition at the market. If M sets his price at a uniform of \$1 per ton, both will ship—but M will lose a greater revenue which he could have garnered from B. And if M's out-of-pocket cost of carriage is \$0.75 per ton, he will want A's \$1 traffic. Early railroads thus developed the practice of charging \$2 to B and \$1 to A, cost of carriage notwithstanding.

This value-of-service pricing is not necessarily unsound economically. Economists generally agree that:

“Preferential rates relieve rather than burden other traffic if two conditions are fulfilled. These are (1) that the rate must more than cover the direct costs; and (2) that the traffic will not move at higher rates.”¹³

And the I. C. C., partly because this was the rate pattern prevailing when the Commission was established, and partly to maximize utilization of the railroads, adopted value-of-service as its own criterion of ratemaking.

The Commission, however, added factors of discrimination other than profit maximization. One of these is subsidization of certain commodities producers, perhaps under political pressures. Thus corn is carried at 85 per cent of out-of-pocket costs; beets at 57 per cent; gravel and sand at 88 per cent; logs at 62 per cent. And of course, passenger traffic has been carried at a loss for some time. These losses are made up on other traffic, such as gasoline, 135 per cent; equipment parts, 236 per cent; and metal alloys, 264 per cent.¹⁴ Other discriminations sometimes introduced by the I. C. C. are attributable to its desire to act as an economic planner, see, *e. g.*, *Anchor Coal Co. v. United States*, 25 F. 2d 462, 470 (S. D. W. Va. 1928):

These official discriminations, hallowed and enserued by time and inertia, now pervade the rate structure; indeed they are the rate structure. The rates on high-value commodities are thus twice subject to arbitrary boosting. First, they bear as part of their “costs” the subsidies extended to traffic which does not pay the out-of-pocket cost of its carriage. And second, high-value commodities are expected to yield for the carriers a profit above their fully-distributed costs sufficient to compensate for any deficiency in the fully-distributed costs of other traffic.

¹³ Locklin, *Economics of Transportation* 158 (1954).

¹⁴ These figures are from I. C. C., *Bureau of Accounts & Cost Findings. Distribution of Rail Revenue Contribution by Commodity Groups—1952*, Table 12 (1955).

This disquisition may help to an understanding of what the I. C. C. attempted and did in this controversy. It serves to point out that "cost" as used by the I. C. C. is a term of art. "Fully-distributed costs" of operation are actually the I. C. C.'s estimate of returns necessary to continued profitable operation. "Fully-distributed cost" of a given service is a largely arbitrary estimate of the proportion of system "costs" which the I. C. C. feels a given service should contribute to total revenue. For example, under the Commission's scheme of rate-making the "fully-distributed cost" of the TOFC freight service is set at a level high enough to absorb, in addition to direct freight expenditures, the TOFC "share" of the eastern railroads' passenger-operations deficit. See Appendix A.

Thus the Commission was inhibited, by the terms of its own analysis, from a meaningful comparison of TOFC's cost to Sea-Land's cost. The "costs" of TOFC for these 66 movements were the sum of the following components: direct TOFC costs, a judgment of the appropriate shares of subsidy owed by TOFC to other railroad traffic, and an estimate of what contribution to total railroad revenue the high-value commodities here involved should make. Except for the application of value-of-service criteria Sea-Land "costs" were not complicated by these extrinsic factors. In short, under the Commission's scheme, TOFC costs and Sea-Land costs were incommensurate quantities.

But this lack of real significance in its cost comparisons is almost academic when set against the Commission's method of decision. That process, as nearly as we can trace it, was as follows. First, Sea-Land's overall revenue needs were calculated by the process outlined in Appendix A. Value-of-service criteria were then applied to determine the share of its needs to be met by the commodities in question. From this figure was derived the "fully-distributed cost" of Sea-Land's carriage of these items. The railroads, in effect, were then ordered to leave the traffic with Sea-Land by maintaining their rates at a 6 per cent differential. This conclusion was bolstered by a recital of TOFC "costs"

computed as we have seen on an essentially different basis. The effect was to obscure, rather than illuminate, the identification of the "low-cost" mode.

If, instead of cancellation, the disposition of the proposed rates had been one of approval, and forced Sea-Land to reduce its own rates on the commodities involved, it is true that the substantial extra margin of profit the Sea-Land rates provide for the company as a whole, which is available to augment the lower profits from the revenues of low-value movements, would have been reduced. This, we think, is what the Commission meant when it said: "The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence, of the coastwise water-carrier industry generally." R. 47. Apparently, the Commission thought that any competition having such effect on water carriers, i.e., to reduce rates on high-value commodities, was necessarily "an unfair or destructive competitive practice" within the meaning of the statutory declaration of the NTP.

Such an interpretation of the Commission's decision might avoid some of the difficulties we find with that order; for example, it would explain why the Commission refused to allow TOFC rates to be lowered to a level still above the railroads' fully-distributed costs. But if the Commission decision does represent such an attempt to preserve its value-of-service ratemaking structure, the decision must fall for lack of evidence and necessary findings. For the Commission would have been warranted in holding up the TOFC rates for these 66 movements to protect an *integral overall rate structure* for Sea-Land only on evidence and findings that, notwithstanding the §15a(3) prohibition of differentials, *the integral overall rate structure* was required by one or more of the policy-factors enumerated in the NTP, and particularly the policy to protect the "inherent advantages" of the overall structure against "destructive competitive practices" and "the need, in the public inter-

est, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service," §15a(2).

There was no finding here that the *overall rate structure* of Sea-Land which the Commission sought to preserve was that of the *overall low-cost mode*. This finding the Commission refused to make; indeed it could not, for as it said, "we do not have before us the rail costs as to many of these rates * * * we can not determine on these records where the inherent advantages may lie as to any of the rates in issue." True, it found that as to many of the 66 movements in question, Sea-Land was a lower-cost mode than TOFC; but it did not find that Sea-Land service was in general a lower-cost mode than railroad service in general. All-rail boxcar service, as well as TOFC, competes with Sea-Land, and as to many boxcar rates the Commission's finding was "the railroads' costs appear to be lower." R. 46. Yet the Commission concluded that Sea-Land was entitled to protection against boxcar competition, as well as TOFC competition though by a differential "somewhat lower" than the 6% prescribed for TOFC. R. 50. See also I. C. C., I. & S. Docket No. 7454 (May 18, 1961). We conclude that, for lack of evidence and findings that Sea-Land was in general the low-cost mode, the action of the Commission, in so far as it sought to protect Sea-Land's overall rate structure, was an unlawful interference with the forces of competition fostered—not proscribed— by §15a(3).

For its disregard of the differential prohibition the Commission also places reliance on the "national defense" clause of the NTP. In this too, we think the Commission misinterpreted the law. True, the hoped-for "end" of the National Transportation Policy is a system "adequate to meet the needs * * * of the national defense." But the national defense is not stated as an operative policy or means: it is mentioned only as the hoped-for "end" of the operative policy-factors previously enumerated. It is not stated, and we think not intended, as a blanket grant of power to the Commission effective to nullify the express

prohibition of rate differentials. By its emphasis on the supposed needs of national defense the Commission overrides the express prohibition of rate differentials without invoking, and without basis for invoking, the two policy-factors of the NTP, discussed above, which may properly qualify that prohibition. Its stress on national defense also brings it into conflict with all three policy-factors enumerated in §15a(2), viz., the effect of the TOFC proposed rates on the TOFC carriers, the public need of railroad service at the lowest compensatory rate, and the carriers' need for compensatory revenues. These three factors are as much a part of the national policy as the several policy-factors in the NTP declaration. Even if these factors were deemed to conflict with each other, we think it not proper to disregard the more recent expressions of Congressional intent contained in paragraph (3) of §15a.

Moreover, we find scant basis of fact supporting the Commission's action even if its interpretation of the applicability of the "national defense" clause were correct. The pertinent evidence seems to be confined to: (1) a 1955 report of the U. S. Maritime Administration entitled "Review of the Coastwise and Intercoastal Shipping Trades." This report stresses the need for break-bulk capacity. Neither Seatrain nor Sea-Land now have such capacity. (2) S. Rep. 2494, 81st Cong., 2d Sess. (1950), which refers in passing to the importance of coastal shipping to the national defense. But the Senate Report is eleven years old, and does not seem to have resulted in legislation. Whatever its relevance in 1950, it must yield to the specifics of the 1958 Act. After all, so far as appears, compulsory rate differentials were not set up to protect the coastwise carriers at the expense of competing modes and the shipping public, from their tremendous loss of tonnage between 1940 and 1958. R. 27.

The Commission says that "shipper evidence . . . is indicative of a need by the general public for the services of these lines." R. 49. This statement assumes the matter for decision: since cost is a major factor, as long as the

Commission maintains a rate differential shippers will "need" the lower-rate mode. Should the Commission heed the statute and allow the reductions, the "need" in evidence may well disappear.

The defendants' other arguments can be disposed of shortly.

The Commission indicates, and the government insists, that a full-fledged rate war is the inevitable consequence of allowing the proposed rate reduction. But surely, under its power to fix minimum rates, 49 U. S. C. A. §15(1), the Commission will have power to disapprove rates not compensatory. Nothing in this opinion disparages that power.

Seatrain in its brief expresses fear that the proposed rates, if effective, would eliminate it as a competitor and suggests that the railroads might use its demise as an opportunity for rate increases. That bogie is laid at rest by 49 U. S. C. A. §4(2). In other respects, the Seatrain position is largely that of Sea-Land and the government except that Seatrain produced no evidence from which its costs could be found. R. 38.

The government further argues that the proposed rates were disallowed not because a differential was needed to protect the water carriers but because the railroads failed to sustain the burden of proof. Thus it says in its brief: "when the proponent of a lowered rate which will deprive another mode of needed traffic, indeed deprive it of any opportunity to compete, fails to establish that the proposed rates are not cost-justified in that they reflect inherent cost advantages, then the rate should not, and certainly need not, be allowed." Beyond doubt, in the situation here, the burden was upon the railroads, as proponents, to submit evidence from which their own costs for the 66 movements could be determined. Indeed, the Act, 49 U. S. C. A. §15(7), provides that "the burden of proof shall be upon the carrier [who seeks a rate-change] to show that the proposed changed rate * * * is just and reasonable." But where, as here, a rate-change is protested because of its effect upon a competing mode by one who claims to have

the inherent advantage of lower costs, it is for the protestant to show its costs. This was expressly recognized in the dissenting report herein and not disputed in the majority report. And in the report of the Commission in No. 32920 on "Various Commodities from or to Arkansas and Texas," decided June 22, 1961, this rule was expressly recognized.

Finally, the government urges that even if the Commission's order was improperly based on a belief that the water carrier traffic, notwithstanding §15a(3), should be protected, it would be futile and fruitless for us to set aside the order because the same order would then be made upon another ground, viz., that the water carriers were in fact the low-cost mode. As we have shown, no adequate basis for such a ground of decision is disclosed in the present record. But even if in this we are wrong, we cannot say what disposition the Commission would make of the controversy if authoritatively advised that the rationale of the report now before us is erroneous. In that event, it would be for the Commission, not this court, to decide whether the record should be reopened for further evidence and to evaluate the evidence. *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80, at pp. 87, 88, 63 S. Ct. 454, 87 L. Ed. 626 (1943).

Accordingly, the order requiring cancellation of the TOFC rates is set aside, and the Commission is enjoined from cancellation of TOFC rates which return at least the fully-distributed cost of carriage.

If, however, on some enlarged record the Commission shall find that the water carriers are in general the low-cost mode, and if it shall also find that value-of-service considerations demand water carrier rates on particular movements and commodities which each return to the water carriers more than their fully-distributed costs, our injunction will not go so far as to prevent the Commission from requiring that TOFC rates be set high enough to protect water carrier traffic; provided, however, a railroad rate for a particular movement, if it yields the railroad's fully-distributed cost which is lower than the water carrier's fully-

distributed cost, may not be disturbed. It is noted that at least two of the rates involved in this proceeding were found to fall in this two-pronged category. See R. 35.

A decree in accordance with this opinion may be submitted by the plaintiffs, on notice unless consultation amongst the parties shall bring about a waiver of notice.

APPENDIX A

The I. C. C. report speaks freely of "out-of-pocket" costs and of "fully-distributed" costs but gives no definition to the sense in which it uses these terms. Since an understanding of the I. C. C.'s cost techniques is necessary to an understanding of its decision, we state in this appendix our understanding of the I. C. C. cost technique as gleaned from the sources indicated.

The I. C. C. employs different techniques for estimating railroad and water-carrier costs, reflecting the differing characteristics of each mode.

Water-carrier costs are calculated by traditional accounting methods, since they are "largely associated with the individual accounting unit," Meyer, Peck, Stenason & Zwick, *Competition in the Transportation Industries*, 112 (1959)—i. e., the operations of a given ship or ships. The costs for component items—including steamships, trucks, stevedoring charges, port charges, interest and depreciation, the motor service charges at each end of the voyage, and overhead—are calculated for representative voyages. Costs per ton-mile are computed by applying average figures for tonnage and mileage.

Costs are then broken down into two categories, (1) "out-of-pocket" and (2) "fully-distributed." "Out-of-pocket" costs represent a rough approximation of the long-run marginal (i. e., added) costs of carriage. Estimates are made of the degree to which each of the cost components mentioned above—steamships, trucks, stevedoring, etc.—varies with the volume of traffic carried. To arrive at a ton-mile figure, non-varying expenditures

(those attributable to size of plant rather than intensity of use) such as billing, terminal supervision, garages, etc., are subtracted from total expenditures, and the remainder divided by ton-miles carried. See Rationale of Cost Finding Section, Hearing Examiner's Proposed Report, I. & S. Docket No. M-10415, Appendix B.

"Fully-distributed" costs, by contrast, represent an approximation of the total long-run costs of remaining in operation. To obtain fully-distributed cost, corporate overhead is first added to "full" operation cost, i. e., to all direct expenditures. Then, on the basis of a 95% "operating ratio", i. e., the ratio between direct expenditures plus overhead, and fully-distributed costs, an allowance for profit is calculated which amounts to about 5.3% (.0526+) of direct expenditures plus overhead. The fully-distributed cost is the sum of this profit, the overhead, and direct expenditures. This method is used by the I. C. C. whenever capital investment is low, so that a return figure based on such investment would not reflect the size of operations. Sea-Land pressed this form of calculation because its vessels are largely chartered and its motor service hired. In this, the I. C. C. acquiesced. See Rationale of Cost Finding Section, I. & S. Docket No. M-10415, *supra*.

Railroad cost figures cannot be developed so easily. The basic difficulty is in "multiple use"—the tracks, rolling stock, terminal expenses, and even the trains themselves, carry mixed shipments to different destinations. Apportionment of costs to the different services offered is a complex and difficult process. For example, assume a train already made up and ready to go. What is the marginal or *added* cost of tacking on two more flatcars? Or should these two cars bear some proportion of costs incurred before they were added, which indeed would have been fully incurred even if the cars had *not* been added?

For accounting purposes, the cars are regarded as bearing a proportionate share of total cost—in other words, the marginal cost of added shipments is in reality average cost of all shipments. Commonly, costs per unit of output—or

variable costs—are calculated by a formula of the type $Y=a+bX$, where Y is the ratio of total operating expenses to miles of track; a is “threshold” cost of operation, non-fixed investment which nevertheless must be made in some minimum quantity when *any* amount of activity is undertaken (such as the pay of one secretary—you can’t hire one-half a secretary); b is cost per unit of output; and X is the ratio of gross ton-miles of traffic to total miles of track. From the above formula, the I. C. C. derives what it calls a “percent variable.” This is an expression of the proportion of variable costs to total costs— $\frac{bX}{Y}$.

MEYER, *et al.*, *supra*, at 274.

To estimate the costs of a particular service, the following procedure is used. Some costs, such as right-of-way maintenance, are developed for the system as a whole, on a gross ton-mile basis, and this average then applied to the movements in question. Other costs, capable of direct observation—e. g., use of switch engines, special equipment—are then added, after application of the “percent variable” derived earlier. The result is the “out-of-pocket” cost of service. See, e. g., Rationale of Cost Finding Section, at R. 54 and following.

For our purposes, it is important to realize what kinds of railroad expenses are attributed to a service by the I. C. C. in calculating “out-of-pocket” costs. (These expenses are included by attribution whenever they are not susceptible of direct observation.) Total operating expense “includes all the labor, fuel, and miscellaneous variable costs associated with the operation of trains, yards, and stations; it also encompasses marketing, advertising, selling and promotion expenses under the catch-all heading of traffic expenses; even supervisory and legal expenses are included; furthermore, the major portion of capital consumption costs is found in the maintenance-of-way and structure and in maintenance-of-equipment accounts. In short, railroad operating expenses include virtually all important railroad costs except property taxes

and interest payments." Meyer, *et al.*, *supra*, at 275. Furthermore, shares of these tax and interest payments, as well as a return figure, are then assigned to the particular traffic under investigation in order to calculate "out-of-pocket" costs. See R. 55.

"Fully-distributed" costs include, in addition to "out-of-pocket" costs: the non-varying portion of operating expenses (b in the formula); the remainder of taxes and interest; the remainder of capital costs; and a 4% return on investment. "Fully-distributed" costs of a particular service are then obtained by adding an aliquot share of the system's fully-distributed cost components to the calculated "out-of-pocket" cost of the service. Cf. R. 55-56.

Appendix B.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT.

Civil Action No. 8679.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION,

Defendants,

SEA-LAND SERVICE, INC., and SEATRAN LINES, INC.,
Defendants-Intervenors.

Judgment.

This cause having been heard on the plaintiffs' complaint seeking to enjoin, set aside, and annul a report and order of the Interstate Commerce Commission dated December 19, 1960 and the order dated February 3, 1961 in a proceeding styled *Commodities—Pan-Atlantic Steamship Corporation*, Investigation and Suspension Docket No. M-10415, which embraces a proceeding styled *Piggy-back Rates—Between East and Texas*, Investigation and Suspension Docket No. 6834, to the extent that such reports and orders found unlawful and unreasonable certain Trailer-on-Flatcar (TOFC) rates described more fully therein and

included in Investigation and Suspension Docket No. 6834; and the parties appearing by counsel having been heard and the issues duly tried; and the Court having concluded in its opinion that plaintiffs are entitled to judgment:

It is hereby Ordered, Adjudged, and Decreed that the above described reports and orders of the Interstate Commerce Commission entered December 19, 1960 and February 3, 1961, to the extent that they found unlawful and unreasonable certain Trailer-on-Flatcar (TOFC) rates described more fully therein, be set aside and vacated in accordance with the opinion of this Court and that the Interstate Commerce Commission is hereby enjoined from enforcing them without prejudice to such further proceedings as the Commission may deem appropriate.

Issued at New Haven, Connecticut, this 8th day of January, 1962.

CARROLL C. HINCKS
United States District Judge

ROBERT P. ANDERSON
United States District Judge

WILLIAM H. TIMBERS
United States District Judge

Appendix C.**INTERSTATE COMMERCE COMMISSION**

INVESTIGATION AND SUSPENSION DOCKET NO. M-10415¹**COMMODITIES—PAN-ATLANTIC STEAMSHIP
CORPORATION**

Decided December 19, 1960

1. In I. and S. Nos. 6906 and M-11375, and embraced proceedings, and upon reconsideration in I. and S. No.

¹In addition to the above-entitled proceeding and 23 others embraced therewith, listed in footnote 1 of the prior report, 309 I. C. C. 587, which are here reconsidered, this report also embraces 19 other proceedings initially decided herein following oral hearing on 3 separate records, namely:

I. and S. Docket No. 6834, Piggyback Rates Between East and Texas, and the following embraced proceedings: No. 32313, Commodities, Pan-Atlantic, Between East and Texas, and fourth-section application No. 34227, Trailer-on-flatcar Service Between Official Territory and Dallas-Fort Worth, Tex.

I. and S. Docket No. 6906, Commodities Via Pan-Atlantic Between Texas, Louisiana, and Florida, and embraced proceedings: I. and S. Docket No. 6918, Bags and Boxes from New Orleans, La., to Florida, I. and S. Docket No. M-11051, Clay and Rosin from South to East, I. and S. Docket No. M-11034, Canned Goods from Fort Pierce, Fla., to Brewster, N. Y., I. and S. Docket No. 6932, Petroleum Products from Baton Rouge to Miami, I. and S. Docket No. M-11264, Various Commodities, Pan-Atlantic Steamship Corporation, I. and S. Docket No. M-11259, Pan-Atlantic Steamship—Between East, South, and Southwest, I. and S. Docket No. M-11077, Commodities Via Pan-Atlantic from East to Florida, Louisiana, and Texas, and I. and S. Docket No. M-11361, Canned Goods from Fort Pierce, Fla., to New York, N. Y.

I. and S. Docket No. M-11375, Tires, Chemicals, and Paint Via Pan-Atlantic, and embraced proceedings: I. and S. Docket No. M-11387, Commodities in Motor-Water-Motor Service from New Jersey and Pennsylvania to Florida, Louisiana, and Texas, I. and S. Docket No. M-11465, Various Commodities from East to South and Southwest, I. and S. Docket No. 6962, Roofing from New Orleans to Tampa, I. and S. Docket No. M-11421, Iron or Steel Castings or Forgings from Houston, Tex., to Buffalo, N. Y., I. and S. Docket No. M-11436, Machinery from New Britain, Conn., to Lubbock, Tex., and I. and S. Docket No. M-11369, Aluminum and Junk from Mississippi and Alabama to the East.

M-10415 and embraced proceedings, sea-land local and joint single-factor through rates on numerous commodities, in trailerload, multiple trailerload, and volume quantities, over single-line routes of Pan-Atlantic Steamship Corporation and joint-line routes of motor common carriers and Pan-Atlantic, from, to, and between numerous points in the East, on the one hand, and, on the other, points in the South and Southwest; also from and to points in the South, and between such points, on the one hand, and, on the other, points in the Southwest, found lawful, except as indicated in the report. Prior findings in I. and S. No. M-10415 and embraced proceedings, 309 I. C. C. 587, affirmed. The excepted rates ordered canceled.

2. In No. 32313, sea-land rates, except a rate of Pan-Atlantic, and rail-water-rail rates of Seatrail Lines, Inc., on numerous commodities over water-rail routes from origins in the East to Dallas and Fort Worth, Tex., found not shown to be unlawful. Unlawful rate ordered canceled.
3. In I. and S. No. 6834, proposed reduced trailer-on-flat-car rates on numerous commodities between points in official territory, on the one hand, and, on the other, Dallas and Fort Worth, found unjust and unreasonable; and, in the fourth-section application No. 34227, authority to establish and maintain the proposed trailer-on-flatcar rates without observing the long-and-short-haul provisions of section 4 of the Interstate Commerce Act, denied. Proposed schedules ordered canceled, without prejudice to the filing of new schedules in conformity with findings made.
4. Proceedings discontinued.

Appearances as shown in 309 I. C. C. 587, and in addition:

JOHN P. GANLY for rail-carrier respondents in I. and S. No. 6834, applicants in fourth-section application No. 34227, and interveners in opposition in No. 32313.

A. J. BORDELON for protestant railroads in I. and S. No. 6906 and embraced proceedings, and TOLL R. WARE for protestant railroads in I. and S. No. M-11375 and embraced proceedings.

ERNEST M. SHARP for the Houston Port Bureau, Inc., ARTHUR L. WINN, JR., SAMUEL MOERMAN, and WALTER J. MYSKOWSKI for the Port of New York Authority, JAMES J. FISHER, Port Agent for the City of Providence, and LOUIS A. SCHWARTZ for the New Orleans Traffic and Transportation Bureau, protestants in I. and S. No. 6834 and fourth-section application No. 34227, and interveners in support of a respondent in No. 32313.

Report of the Commission on Reconsideration.

BY THE COMMISSION:

These proceedings are related and will be disposed of in one report. It was agreed by the parties that all of the evidence in Investigation and Suspension Docket No. M-10415 and proceedings embraced therein could be referred to in the other proceedings and, to the extent relevant, would be competent evidence therein. As indicated in footnote 1, 43 separate proceedings are embraced herein. The title case and the 23 proceedings embraced therewith were the subject of a prior report, 309 I. C. C. 587, which is here being reconsidered. The other 19 proceedings were the subject of 3 separate reports proposed by the examiner in Investigation and Suspension Dockets Nos. M-11375, 6834, and 6906, and embraced proceedings.

Exceptions to the proposed reports and replies thereto were filed by the respondents and the protestants. The issues have been orally argued before us. Our conclusions differ in part from those proposed. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

The issues presented are the justness and reasonableness of several sets of rates² involving different modes of transportation; namely, (1) certain reduced so-called sea-land rates of the Pan-Atlantic Steamship Corporation³ (hereinafter called Pan-Atlantic) and the motor common carrier participants in its tariffs; (2) numerous rail-water-rail rates of Seatrain Lines, Inc. (hereinafter called Seatrain) and (3) numerous proposed reduced rail trailer-on-flatcar rates, hereinafter called TOFC rates, which reflect substantial parity with the sea-land and Seatrain rates and which the railroads claim are necessary for them to compete for this traffic. The most important question before us here is whether, in attempting to meet the competition of Pan-Atlantic and Seatrain, the railroads may establish compensatory rates which are on a parity with the rates of those competitors, or whether the ratemaking provisions of the Interstate Commerce Act, interpreted in the light of the national transportation policy, under the facts here presented, require that the rail rates on this traffic be maintained differentially higher than the rates of those competing modes.

The prior report in I, and S. Docket No. M-10415 and embraced proceedings sets forth the history and description of the sea-land service of Pan-Atlantic, its advantages and disadvantages, rationale of the cost evidence, and other background material. A clear understanding of the related issues in these proceedings requires first a summarization of this evidence, after which we shall direct our attention to the issues and contentions of the parties in these proceedings.

The sea-land service of Pan-Atlantic in conjunction with certificated motor carriers, and by the use of its own motor equipment, moves merchandise freight in highway containers over motor-water-motor routes between the East,

² Rates and costs are stated per 100 pounds, except as otherwise indicated.

³ Name changed to Sea-Land Service, Incorporated, on April 1, 1960.

on the one hand, and the South and Southwest, on the other, and also between the Southwest and the South. The freight is moved from the shippers' docks over the highways in demountable highway containers to the port and thence lifted onto Pan-Atlantic ships for movement to the destination ports. At the destination ports the containers, with the freight intact, are lifted off the ships and onto highway trailers for delivery to the consignees' docks. This service is closely akin to railroad trailer-on-flatcar service with the substitution of the deck or the hold of a vessel for the rail flatcar.

Prior to the institution of sea-land service, Pan-Atlantic engaged in break-bulk water service, which also provided joint routes with motor common carriers and door-to-door service from consignor to consignee. In the prior break-bulk service longshoremen handled the lading into and out of the ships, whereas in sea-land service the containers with the lading are lifted on and off the ships by the use of two gantry-type cranes on each vessel. Each crane is capable of unloading one trailer and placing another on board ship in about 5 minutes. These patented cranes are part of the ships, and eliminate the need for costly shore installations. The cranes make it possible to serve any port having adequate water and dockside aprons large enough to permit bringing a truck chassis alongside the vessels. Compared with the slower and more expensive break-bulk service, sea-land has reduced considerably Pan-Atlantic's costs, the cargo-handling time, the inport vessel time, and its loss, damage, and pilferage expenses.

Whether the containers are loaded or empty, a full complement of 226 containers is carried on each voyage. To achieve the proper balance of the cargo, it is necessary that there be a systemized sequence of loading the trailer bodies. For this purpose, many of the outbound containers are assembled at a parking lot near the port at least 60 hours in advance of the vessel's arrival, and the bulk of the cargo must be delivered to shipside parking lots at least 12 hours before the arrival of the ship. The proper sequence of loading affects the trim of the vessel, the list

of the vessel during and upon completion of loading, and the degree of roll and stability. In addition, certain types of containers must be stowed in a limited number of positions only, depending upon the weight, the container construction, the cargo carried, and the destination. One truck breakdown en route to the parking lot from a pickup point could destroy the entire planned loading sequence for any one hatch. Generally, Pan-Atlantic cannot accept sea-land freight and load it on a ship the same day.

Both single-line and joint-line sea-land services are provided by Pan-Atlantic. It operates single line between ports and port terminal areas which it is authorized to serve, by use of its trailerships on the water and leased tractors and trailers on the land. In some instances Pan-Atlantic has operated single line as far as 60 miles beyond a port; its performance of such extensive "terminal" service was found to be without appropriate authority in *Central Truck Lines, Inc. v. Pan-Atlantic S.S. Corp.*, 82 M. C. C. 395.

The joint-line sea-land service of Pan-Atlantic extends well beyond the ports and port terminal areas. For example, electrical appliances may move joint-line motor-water-motor, from Somersworth, N. H., via the ports of New York (Port Newark, N. J.) and Houston to Dallas, Tex.

Presently, Pan-Atlantic is a wholly owned subsidiary of McLean Industries, Inc. The total investment in the new type sea-land operations made by McLean, or its subsidiaries or affiliates, aggregates between \$40 and \$45 million, of which about 50 percent was used for conversion of break-bulk type vessels to sea-land vessels, over \$20 million for automotive equipment, and about \$500,000 for procurement of terminal facilities, including docks, piers, staging areas, and warehouses.

Beginning in 1933, Pan-Atlantic operated as a conventional break-bulk carrier, except during the World War II years. In May 1957, it suspended its Atlantic-Gulf coast-wise break-bulk service to provide vessels for conversion into trailerships. For its sea-land service in the Atlantic-

Gulf coastwise trade, it converted four vessels into trailer-ships, each with a capacity of 4,000 tons of payload freight, and each holding 226 containers, of which 166 are stowed below deck and 60 on deck. The ships are 468 feet long and capable of a speed of about 15.5 knots, substantially the same as when the ships were used in the break-bulk service.

Prior to World War II there were about 19 deepwater common carriers operating in the Atlantic-Gulf coastwise trade, employing about 139 vessels. In 1940, these water carriers transported more than 8,500,000 tons of cargo. Today, only two carriers are in this trade: namely Seatrain and Pan-Atlantic, operating, respectively, six and four vessels. A comparison made by Pan-Atlantic shows that between 1939 and 1956, inclusive, the tonnage handled by class I railroads in the United States increased 160.5 percent, and the tonnage handled by class I motor carriers increased 545.6 percent. Excluding bulk oil carried by Seatrain and Pan-Atlantic, the tonnage handled by water carriers in the Atlantic-Gulf coastwise trade during that period declined 79 percent.

Since World War II there has been a substantial expansion of commerce in the United States, particularly in the South and Southwest. An exception to the general growth of transportation has been the Atlantic-Gulf coastwise dry-cargo tonnage of the water service. Pan-Atlantic estimates that Seatrain operating at full capacity could transport about 1 million net tons annually, and that Pan-Atlantic could transport about 800,000 net tons per year (100 round-trip voyages with full loads of 4,000 tons in each direction). The total for the two water carriers would thus be 1,800,000 net tons, compared with over 8,500,000 net tons transported prewar by the water carriers in the same trade. Excluding bulk petroleum carried in tankers, Pan-Atlantic carried in excess of 1 million tons in its coastwise break-bulk service in 1950. In 1956 and 1957, it carried in coastwise service only 433,915 and 332,057 tons, respectively.

Traditionally, water rates, including water-rail and water-motor rates, have been maintained at levels differ-

entially lower than the corresponding all-rail rates, principally because of disadvantages in the water service due to perils of the sea, slower transit time, and infrequency of sailings. The last major proceeding in which the rates of the Atlantic-Gulf coastwise water carriers were considered was *Class Rate Investigation, 1939*, 286 I. C. C. 5 (docket No. 28300—1952). Therein, we prescribed reasonable maximum first-class rates on ocean-rail traffic, and also reasonable percentage relations of the lower classes to first class, between North Atlantic ports and interior points in eastern seaboard territory, on the one hand, and, on the other, New Orleans and Baton Rouge, La., Texas-Gulf ports, and interior points in the Southwest. Those class rates were designed to preserve the then existing differentials of the ocean-rail rates under the all-rail rates.

The prescribed rates in No. 28300 were class rates, whereas in the instant proceedings only commodity rates are in issue. When it inaugurated the sea-land service, Pan-Atlantic evaluated the rate structures of the existing water and overland carriers and concluded that its sea-land service needed rate differentials under all-rail rates, but that lesser differentials would suffice than those maintained under its previous break-bulk service.

For its trailership service, Pan-Atlantic first put into effect class rates, and later commodity rates. Generally the class rates were protested, but were not suspended and became effective. Many of the commodity rates were suspended and are under investigation in these and other proceedings. The class-rate structure established by Pan-Atlantic varies depending upon origins and destinations, the direction of the competing rail rate-making routes, the constructive water mileages, and the prescribed maximum ocean-rail rates, among other factors. Generally, its trailership class rates are on the basis of 92.5 percent of the overland-carrier rates on terminal (port) to terminal (port) traffic, and on the basis of 95 percent of the overland rates on traffic moving from, to, or between interior points located beyond the terminals (ports).

The commodity rates for its trailership service in general were related percentagewise to the all-rail commodity rates in the same measure as the sea-land class rates are related to the all-rail class rates. As there are exceptions to the 92.5-95 percent formula in the class-rate structure, so also there are numerous exceptions to that formula for commodity rates. Individual adjustments are made in the latter rates because of varying competition with all-rail carriers, all-motor common carriers, Seatrain, a barge line, and exempt motor carriers. Also, there are instances where the sea-land rates were designed to preserve competitive relations between shippers located at different origins. The result is a wide fluctuation in the differentials between the sea-land rates and the all-rail commodity rates.

Pan-Atlantic contends that the primary accomplishment of its sea-land trailership service lies in the reduction of its internal operating expenses, rather than in any substantial improvement in the value of its service to the public. The expenses in the present sea-land trailership operation are from \$10 to \$12 per cargo ton less than those incurred in the previous break-bulk type of operations. This reduction in expense is mainly a result of the reduction in cargo-handling time and in port vessel time. On the other hand, the rail and motor carriers generally contend that there has been a substantial change in the character of Pan-Atlantic's service from the old break-bulk service to the new trailership service, and particularly in its value to the shipping public. Pan-Atlantic's own literature and public advertisements represent that its trailership service will save transportation costs, avoid delays, prevent damage, and accomplish a reduction in loss, damage, and pilferage.

The views of the shippers on the comparative value of sea-land service to rail service were many and varied, according to their individual transportation problems. Door-to-door service is an important consideration to many shippers. In sea-land service, the lading often moves in a sealed trailer from the door of the consignor to the door of the consignee without being handled en route. Where a shipper or consignee does not have a private or assigned

rail siding, the sea-land service has a distinct advantage over rail service; the same as all-motor service. Thus, some New York City consignees do not have private or assigned sidings, which makes drayage necessary when using all-rail service. A survey made by Pan-Atlantic showed that out of 2,350 of its potential shippers and consignees, 1,805, or about 77 percent, had private rail sidings, while 545 were either not located on rail sidings or were served by team tracks.

Among other factors considered by the shippers in determining the value of the respective services are time in transit, frequency of service, costs of loading and unloading, cost of blocking, dunnage, and bracing, loss or damage, and the availability of stopoff privileges. The testimony of the shippers on these value-of-service factors is recounted in detail in the prior report. Generally, their testimony was inconclusive and failed to show whether the water carrier's service or the rail carriers' service is more valuable to the shippers by reason of these compared factors.

The most important, and usually the determinative, factor to the shippers as a whole is the measure of the rates. Most of the shippers would not use sea-land service at rates equal to or higher than all-rail or all-motor rates. A number of shippers also would not use sea-land service at rates higher than those of Seatrain. Some shippers who would not use sea-land service if Pan-Atlantic's rates were equal to the rail rates, also would not offer any of their traffic now moving by sea-land service to the railroads if the rail rates are maintained at the present differentials over sea-land rates. Certain other shippers would not use all-rail service even at differentials under all-motor or sea-land rates. Price competition in the sale of some commodities is so keen that the shippers thereof cannot pay a transportation premium for one mode of service as against another.

As indicated, the proceedings herein were heard on four separate records under the lead docket numbers, I. and S. Dockets Nos. M-10415, 6834, 6906, and M-11375, and for convenience of further discussion the other pertinent facts

and contentions of the parties are hereinafter discussed under those respective numbers.

The reduced sea-land rates of Pan-Atlantic and the rail-water-rail rates of Seatrain here under investigation have become effective; the effective date of the proposed reduced TOFC rates has been voluntarily postponed by the rail carriers. For convenience, the rates under investigation will sometimes be referred to as the proposed rates.

I. AND S. DOCKET NO. M-10415

In the prior report in these proceedings, division 3 considered the lawfulness of approximately 469 proposed reduced commodity rates of Pan-Atlantic and the motor common carrier participants in its tariffs for the transportation in sea-land service of numerous commodities in trailerload, multiple trailerload, and volume quantities from, to, and between numerous points in the East, South, and Southwest.

Generally, the proposed sea-land rates are lower than the all-rail boxcar rates. In a few instances, for example where there are several rates and minima on a commodity, the all-rail rates are lower than the proposed sea-land rates at the higher minima. Certain of the proposed sea-land rates are listed in appendix A to the prior report, together with the sea-land costs and corresponding all-rail rates and costs. The sea-land costs are broken down between the Pan-Atlantic portion and the motor-carrier portion. Also shown in that appendix are representative examples of the ratios of the sea-land rates to the sea-land costs, and the ratios of the sea-land costs to all-rail costs. The costs shown in that appendix are those obtained from a restatement of the sea-land costs by our cost finding section. The detailed rationale of the restatement is found in appendix B to the prior report.

Of the 489 rates listed, including 20 rates canceled under special permission, 13 failed to yield out-of-pocket cost, and 145, or about 30 percent, failed to yield fully distributed cost. In the circumstances presented, division 3 con-

cluded that a lawful rate need not necessarily yield fully distributed cost. Some of the sea-land rates are more than double the out-of-pocket costs and nearly double the fully distributed costs. Other sea-land rates exceed the costs by narrower margins. Of the 13 rates which failed to cover out-of-pocket costs, 2 were canceled under special permission.

In the prior report, division 3 found the proposed reduced sea-land rates of Pan-Atlantic not unlawful, except 11 rates on the commodities and from and to the points shown in the footnote below,⁴ which failed to cover out-of-pocket costs. The latter rates were found not shown to be just and reasonable, and ordered canceled.

Upon petition of the railroad protestants, to which the respondents replied, we reopened the proceedings for reconsideration on the present record. The rail protestants do not seek reversal of the prior finding that, with the exceptions noted, the proposed sea-land rates are not unlawful. They do not question that finding. Their request for reconsideration is based upon the ground that the division strongly inferred in its report that in its consideration of any future rail-rate adjustments on this traffic, it would disapprove rail rates that would eliminate rate differentials in favor of sea-land. The protestants admit that no differentials or rate relationships which would prevent the adjustment of rail rates in the future were prescribed, but they object to the following paragraph on page 606 of the prior report:

There is indication that if the proposed rates are approved, the all-rail carriers intend to counter with reduced rates of their own. In such event, they should take into account the effect thereof upon

⁴ Shipping carriers (empty barrels and bottles) from Daytona Beach, Fla., to Philadelphia, Pa.; canned goods from New Orleans, La., to Baltimore, Md., and Rochester, N. Y., from Gulfport, Miss., to Philadelphia, and from St. Francisville, La., to Miami, Fla.; pulpboard from Bogalusa, La., to New York, N. Y., and from Kreole, Miss., to New York and New Brunswick and Wharton, N. J.; and synthetic plastics from Baton Rouge, La., to Baltimore and Rome, N. Y.

the national transportation system and the implications of the national transportation policy, consideration of which is required by the established rules of ratemaking.

The railroads also object to the conclusion on page 605 that "the evidence indicates that the sea-land service generally must have rates lower than those by rail in order to attract any substantial volume of this traffic." They argue that this conclusion rests solely upon the unsupported belief that sea-land is an inferior service and that it must be protected from the price competition of the railroads. These protestants request that the report be so modified as to make clear that the approval of any of the sea-land rates does not constitute a prescription or approval of differentials in favor of sea-land rates compared with rail boxcar rates.

The prior report is criticized also by the railroads for its failure to adopt the examiner's conclusion that, comparing the rail boxcar service with the sea-land service, the cost studies indicate that the railroads are generally the lower cost agency. In this connection, the division, while accepting the cost finding section's restated costs, stated at page 605:

We do not have before us either rail or sea-land costs as to many of these rates, and there is a complete absence of any all-motor costs. Moreover, as above discussed, other considerations enter into the factor of inherent advantages. For these reasons, we cannot determine on this record where the inherent advantages may lie as to each commodity, and still less as to each particular rate.

The foregoing conclusion of the division was based primarily on the fact that the all-rail costs submitted by the railroads dealt with 268 movements whereas 469 sea-land rates are involved. Either rail class or commodity rates are published from and to all of these points.

The ultimate conclusion of the cost finding section as to the lower cost agency was included in the examiner's proposed report, but was omitted in the division's report. The parties stipulated that the several cost studies could be referred to the cost finding section for analysis. Since that section has been cast in the role of an expert witness, its conclusion in the analysis should have been included in the report. That conclusion is that a comparison of the sea-land costs with the all-rail costs of record shows that, for most of the movements where rail costs are shown, the sea-land costs exceed the all-rail costs of boxcar service, and that this latter relationship is more pronounced at high minimum weights. We have considered the cost finding section's conclusion along with other facts of record in reaching our conclusion herein.

Our disposition of the other arguments and contentions in the rail carriers' petition for reconsideration is reflected in the findings hereinafter made.

I. AND S. DOCKET NO. 6834

By schedules filed to become effective on November 14, 1957, and later, in I. and S. Docket No. 6834, the rail-carrier respondents proposed to establish new reduced rates listed in 27 tariff items on numerous commodities in TOFC service between⁵ points in the East, on the one hand, and, on the other, Dallas and Fort Worth. Upon protests thereto, the operation of the schedules was suspended to and including June 13, 1958. The effective date of the schedules has been postponed voluntarily by the respondents.

In fourth-section application No. 34227, the respondent rail carriers seek authority to establish and maintain the above-mentioned TOFC rates without observing the long-and-short-haul provisions of section 4 of the act. The car-

⁵ With one exception, the proposed rates are southbound from points in the East to Dallas and Fort Worth. There is one northbound rate on bags, cotton, new or old, from Dallas and Fort Worth to Baltimore, Md. This northbound rate also applies from and to other points taking the same rates, as provided in the tariff.

riers propose to continue to maintain certain higher rates to and from intermediate origins and destinations. The proposed rates and the application for fourth-section relief in connection therewith are opposed by the Secretary of Agriculture of the United States, Pan-Atlantic, Seatrain, The Eastern Central Motor Carriers Association, Inc. (hereinafter called Eastern Central), the Houston Port Bureau, Inc., the Port of New York Authority, the city of Providence, and the New Orleans Traffic and Transportation Bureau. No shippers or receivers located at the intermediate points oppose the granting of fourth-section relief.

In No. 32313, by order dated November 8, 1957, an investigation was instituted into effective rates of Pan-Atlantic listed in 22 tariff items in connection with its sea-land service on numerous commodities from origins in the East to Dallas and Fort Worth. By first supplemental order dated December 18, 1957, the investigation was broadened to include certain effective rates of Seatrain in connection with its rail-water-rail service from eastern origins to Dallas and Fort Worth. The sea-land and Seatrain rates are opposed by the rail carriers and by Eastern Central.

The proposed TOFC rates are on a parity with the present sea-land rates, and are substantially the same as the Seatrain rates. Since the railroads are parties to the Seatrain rates to the extent that such rates apply from inland points, technically the railroads are respondents in No. 32313, but they are not defending the Seatrain rates.

The background of the TOFC and other rates.—The railroads published the proposed TOFC rates on a parity with the current rates for the sea-land service upon the assumption that these two operations, which have many of the characteristics of overland motor-carrier service, are equivalents from a quality standpoint, and that therefore, in the absence of special circumstances, they should be priced at the same levels. Generally, as stated, Pan-Atlantic and Seatrain contend that the water-carrier services are entitled to rates differentially lower than the rates of the overland carriers. Eastern Central takes the position that

TOFC rates generally should be continued on the level of the motor common carrier rates, and that if TOFC rates are reduced the motor-carrier rates also will have to be reduced. It urges that the railroads in their proposed TOFC service may not find it necessary to meet the exact Pan-Atlantic rates, and that the record may warrant a differential of the Pan-Atlantic rates under the TOFC rates, which it believes, however, should be less than the differentials presently maintained.

Rail TOFC service between points in the Southwest and points in the western part of official territory, including Pittsburgh, Pa., was inaugurated on June 13, 1956. Later, on September 8, 1956, the official-territory origins were extended to include points east of Pittsburgh. For this service, rates were published generally on a parity with the prevailing motor-carrier rates. When Pan-Atlantic inaugurated its sea-land service between the Southwest and the East in the fall of 1957, the railroads were convinced that they could not compete without a reduction in their TOFC rates. They decided to publish TOFC rates on the same level as the sea-land rates, but not between all origins and destinations. It was their intention to publish the TOFC rates herein from selected points in official territory to Dallas and Fort Worth as a limited pilot or trial effort to meet the sea-land rates. A wholesale reduction in the TOFC rates would have disturbed competitive patterns between the railroads and the motor common carriers, and also would have created competition among the rail services, because the TOFC rates on the sea-land basis in many instances would have been lower than the all-rail boxcar rates.

Since the proposed TOFC rates were made applicable only to the destinations of Dallas and Fort Worth, they would result in fourth-section departures. Avoidance of these departures would have entailed substantial reductions in rail revenues at intermediate points well outside the sphere affected by the sea-land competition. There is such competition at Dallas and Fort Worth.

The general rate situation among the various carriers herein is illustrated by the rates on candy and confectionery. For example, from Naugatuck, Conn., to Dallas and Fort Worth, the sea-land rate is 207 cents, minimum 36,000 pounds, and this is also the proposed TOFC rate. The Seatrain rate from and to the same points is 208.25 cents, minimum 65,000 pounds. The present all-rail boxcar rate is 220 cents, minimum 36,000 pounds, and the corresponding all-truck rate in effect prior to December 9, 1957, was 284 cents, minimum 23,000 pounds.

The proposed TOFC rates, in reflecting parity with sea-land rates, at times go below the Seatrain rates. The sea-land rates are not always the same as the Seatrain rates, and there are differences also in the minimum weights. In part, the differences between Seatrain and sea-land rates are caused by the variations in the application of general increases on the single-factor sea-land commodity rates and on the combination rail-water-rail Seatrain rates. Where the Seatrain rates are competitive with the rates of the overland carriers, it is the intention of Pan-Atlantic to eliminate minor differences between its rates and the rates of Seatrain by adjusting the sea-land rates to the level of the Seatrain rates. In those instances where Pan-Atlantic does not consider the Seatrain rates to be competitive with the rates of the overland carriers, it intends to maintain differentials so that the sea-land rates will be about 5 per cent under the overland competitive rates.

Sea-land and TOFC costs.—Extensive cost evidence was submitted by the rail carriers and by Pan-Atlantic, and, as requested by the parties, this evidence has also been considered by our cost finding section, which has restated the TOFC costs and the sea-land costs. Representative rates, restated costs, and cost ratios are shown in appendix A hereto. The rationale of the restatement of the TOFC costs appears in appendix B. The rationale of the restatement of the sea-land costs is the same as that used in connection with I. and S. Docket No. M-10415, and others (appendix B of the report therein), and will not be repeated here.

The sea-land rates.—The sea-land rates, with one exception, exceed the restated out-of-pocket cost of performing the service, and they range as high as 258 percent of the out-of-pocket cost. The one exception is the rate of 216 cents, minimum 20,000 pounds, on paint and paint materials, from Baltimore to Dallas and Fort Worth, for which the restated out-of-pocket sea-land cost is 217 cents, or 1 cent more than the rate. There is no corresponding proposed TOFC rate, minimum 20,000 pounds. There are under investigation herein both a sea-land and a proposed TOFC rate on paint and certain other commodities from Baltimore of 187 cents, minimum 36,000 pounds, which rate exceeds the out-of-pocket costs by sea-land and by TOFC. Most of the sea-land rates herein also exceed fully distributed costs.

The restated sea-land costs, both out-of-pocket and fully distributed, are below the restated TOFC costs for all movements of comparable weight as computed for railroad-owned flatcars having a capacity of a single trailer and equipped with tiedown devices. In connection with flatcars not presently owned but leased by the railroads, designed to hold two trailers with special holddown devices (hereinafter called T.T.X. cars), the restated sea-land costs are below the restated TOFC costs for all except 2 of the 66 movements listed in the restatement. We conclude that, generally, for the movements herein, the costs of record indicate that sea-land is a lower cost service than TOFC.

After inauguration of Pan-Atlantic trailership service to and from Houston, Tex., in October 1957, shipments were made in 1957 in connection with only 13 of the 22 Pan-Atlantic tariff items under investigation herein, and only 15 shipments moved under 7 of those 13 items. The record does not disclose the amount of traffic handled at rates in the other 6 active items, but on the whole the amount of traffic handled in sea-land service at rates in these 22 items in 1957 after inauguration of the service in October apparently was relatively small. There is no indi-

cation that Pan-Atlantic has moved any traffic at rates as high as competing all-rail boxcar or TOFC rates.

The proposed TOFC rates.—As shown in the restatement of costs by our cost finding section, the proposed TOFC rates equal or exceed the restated out-of-pocket TOFC cost computed for hauls with so-called average circuitry (the shortline distance between the origin and the Chicago and East St. Louis, Ill., gateways and between these gateways and the destination, increased by 13 percent as an allowance for average circuitry); for all listed movements by T.T.X. cars; and for all but 6 of 66 listed movements by railroad-owned cars. The proposed TOFC rates equal or exceed the fully distributed costs for 43 movements by T.T.X. cars and for 14 movements by railroad-owned cars. More trailers per car are carried on T.T.X. cars than on railroad-owned cars.

The six movements in railroad-owned cars which do not return out-of-pocket costs are electric switch boxes from Newark, N. J. (rate 240 cents, minimum 24,000 pounds, restated out-of-pocket cost 249 cents); foodstuffs from New York, N. Y. (rate 222 cents, minimum 24,000 pounds, out-of-pocket cost 249 cents); laundry sour from Baltimore (rate 169 cents, minimum 36,000 pounds, out-of-pocket cost 172 cents; and rate 195 cents, minimum 24,000 pounds, out-of-pocket cost 236 cents); alcoholic liquors from Baltimore (rate 267 cents, minimum 20,000 pounds, out-of-pocket cost 276 cents); and alcoholic liquors from Philadelphia (rate 280 cents, minimum 20,000 pounds, out-of-pocket cost 283 cents). As we have no way of knowing the percentages of this traffic which would move in railroad-owned cars and in T. T. X. cars, we conclude that the rates for these six movements are not shown to be compensatory.

The Seatrail rates.—The investigation herein of Seatrail rates is limited to those on three groups of commodities, briefly described as linoleum, ammunition, and candy and confectionery. The first commodity group is more generally described as floor coverings or related articles, including carpets, mats, rugs, coverings, and linoleum. The

instant rates on linoleum range from 35.5 to 40.6 percent of the No. 28300 first-class rail-water-rail rates. In *William Volker & Co. of Texas, Inc., v. Central R. Co. of Pa.*, 302 I. C. C. 757, the complainants assailed the combination rates on linoleum transported over rail-water or rail-water-rail routes, including rates from and to the origins herein. The assailed rates comprised in most instances the aggregates of intermediate rates, consisting in part of exceptions or commodity-rate factors. These rates produced higher charges than did rates established on the uniform classification basis. We found that for the future those assailed rates were unjust and unreasonable to the extent that they exceeded the contemporaneous uniform classification basis. Rates in conformity with that order, on the basis of 35 percent of first class, were published effective May 15, 1958. These rates, now in effect, are on a basis lower than that reflected by the Seatrain rates on linoleum under investigation herein. Accordingly, this phase of the investigation of Seatrain rates will not be further discussed.

The rates of Seatrain on ammunition here under investigation apply from Edgewater, N. J., to Dallas and Fort Worth on traffic originating at Bridgeport and New Haven, Conn. These proportional rates, when added to the all-rail factors from origin to Edgewater, produce combination rail-water-rail rates to Dallas and Fort Worth of 295 and 300 cents, respectively, minimum 40,000 pounds. These commodity rates alternate with higher rates, minimum 30,000 pounds, not here under investigation, which are based on classification exceptions. The Seatrain commodity combination rates, minimum 40,000 pounds, are related to the corresponding all-rail commodity rates⁶ by lesser differentials than are the Seatrain exceptions class rates to the corresponding all-rail exceptions class rates. The differential of 70 cents per 100 pounds of the rail-water-rail 30,000-pound rates under the corresponding all-rail rates results from the (exceptions) class rates pre-

⁶ Reference to all-rail rates means to existing all rail rates, and does not refer to the proposed TOFC rates.

scribed or approved in docket No. 13535. The commodity combinations, minimum 40,000 pounds, reflect differentials of 39 cents or 56 percent, and 34 cents or 49 percent, respectively, from Bridgeport and New Haven, of the class-rate differential.

During 1957, Seatrain obtained a total of three carloads of ammunition from Bridgeport to Dallas and Fort Worth, and no movement from New Haven. One of the three shipments moved at the 30,000-pound rate and the other two at the 40,000-pound rate. Under the existing rates, Seatrain participated in only a small portion of the ammunition traffic. Obviously, if the ammunition differentials were replaced by rate equalization, Seatrain's competitive position would be weakened considerably.

The rates of Seatrain on candy and confectionery here considered are from Edgewater to Texas City, Tex., on shipments coming from specified origins in Connecticut, Massachusetts, New Jersey, New York, and Pennsylvania. These proportional rates, when added to the all-rail factors to and from the ports, produce combination rates subject to minimum weights of 50,000 and 65,000 pounds which alternate with certain class rates, minimum 36,000 pounds.

The existing all-rail rates on candy and confectionery are exceptions class rates, minimum 36,000 pounds. They are lower than the rail-water-rail class rates, minimum 36,000 pounds, and also lower than some of the Seatrain commodity combination rates, minimum 50,000 pounds. The Seatrain commodity combination rates, minimum 65,000 pounds, are lower than the existing all-rail exceptions class rates, minimum 36,000 pounds, by 5 cents at Camden, N. J., and Philadelphia, Pa., by 9 cents at Boston, Cambridge, Malden, Mansfield, and Milton, Mass., and Reading, Pa., by 11 cents at Naugatuck, and by 12 cents at Brooklyn, N. Y.

Of the 14 origins for candy herein, in 1957 Seatrain obtained only a total of 4 carloads, each over 65,000 pounds, from Mansfield. Thus, Seatrain participated in only a very small portion of the candy traffic. Obviously, if the candy differentials favorable to Seatrain were replaced by

rate equalization, its competitive position would worsen considerably.

Seatrain costs.—No evidence was introduced by Seatrains or by any of the other parties herein concerning the cost of the Seatrains service or the compensatory nature of its rates. While it was agreed that the annual reports of all parties might be referred to, and materials therefrom used without proof of authenticity, subject to objections as to relevancy and materiality only, no specific reference to the Seatrains reports was made at the hearing. On brief, Seatrains states that data embodied in its annual reports clearly show the compensatory nature of its rates under investigation herein. We conclude that the evidence does not warrant a finding that the Seatrains rates are non-compensatory.

The comparative values of the TOFC, sea-land, and Seatrains services.—From the standpoint of the shipper, the TOFC service and the sea-land service are similar in that both provide door-to-door motor-carrier service; that is, the shipment leaves the consignor in a motor-carrier trailer and arrives at the door of the consignee in the same motor-carrier trailer. In TOFC service, the trailer is moved on railroad flatcars, and in sea-land service the trailer body or box is moved on a trailership during the course of the line-haul movement.

Seatrains service is similar to all-rail boxcar service in that the service offers to the shipper the transportation of his lading in a rail car from consignor to consignee. To the extent that all-rail service has certain service disadvantages, such as in the case of a shipper not located on a private siding, these disadvantages also generally beset the Seatrains service. Seatrains at present offers service between the ports of Edgewater, on the one hand, and, on the other, Belle Chasse, La., and Texas City, using freight cars as containers. Seatrains contemplates the inauguration of a new so-called "seamobile" service, which is to be similar to Pan-Atlantic's sea-land service. Seamobile would use special containers which would be transferred

readily between Seatrain vessels and highway trailers or rail cars.

The rail carriers regard Seatrain as offering a lower quality service than TOFC, and TOFC service as generally of higher quality than all-rail boxcar service. According to them, there is no indication that Seatrain service is of lower quality than all-rail boxcar service.

Generally, all of the parties agree that TOFC is a higher quality service than all-rail boxcar service. A number of shipper witnesses presented by Pan-Atlantic stated that they would not use sea-land service at rates equal to or higher than the all-rail rates. Although this testimony dealt primarily with a comparison of sea-land with rail boxcar service, inasmuch as TOFC is of higher quality than all-rail boxcar service, it follows that the testimony has application also to a comparison of sea-land with TOFC service.

On the other hand, a number of shipper witnesses presented by the rail carriers made statements to the effect that they would not use TOFC service unless the railroads offered piggyback rates equal to sea-land rates. Some of these shippers would not use carload boxcar service because their customers are not located on rail sidings, whereas sea-land service provided store-door delivery, and these shippers indicate that the railroads must provide TOFC service to compete with the sea-land service. One of these shipper witnesses stated that transit time has never been an important factor to it. Other shippers are concerned with transit time, and state that between certain points not in issue herein sea-land service has been faster than all-rail boxcar service.

Slower transit time is listed by Pan-Atlantic as one of its service disadvantages in relation to the proposed TOFC service. On four voyages during November and December 1957, the average transit time by sea-land was 13.98 days from eastern origins to Dallas and Fort Worth, and a study made by the rail carriers for all-rail boxcar service showed an average transit time of 10 days from New England to the Southwest and 9 days from trunkline

territory to the Southwest. Generally, so far as this record shows, TOFC service has about the same or 1 day faster transit time than all-rail boxcar service. For cost purposes, the rail carriers and Pan-Atlantic used TOFC costs for trailer rental based on average round-trip times, respectively, of 13.4 days and 14 days. We conclude that the average one-way TOFC transit time from origin to destination is about 7 days, and that sea-land service is generally slower than TOFC service.

Seatrains lists the same general disadvantages of its service in relation to the proposed TOFC service as were listed by Pan-Atlantic. Seatrain has two weekly sailings from Edgewater to Texas City, and two weekly sailings in the reverse direction. Seatrain time in transit by water between these ports is 6 days one way, and to this time there must be added from 3 to 5 days for the movement from New England or trunkline territory to Edgewater, and 2 days for the movement from Texas City to Dallas or Fort Worth. Seatrain transit time is slower than the proposed TOFC service. Seatrain also lists restrictions on the size of cars which its vessels are designed to handle, and the bunching of cars at destination when shipped via Seatrain to a multiple-car consignee, as additional service disadvantages. As stated, it is conceded by the parties that Seatrain offers a lower quality service than TOFC.

Generally, the rail carriers consider sea-land service to be superior to the Seatrain service. Pan-Atlantic contends that the railroad position is influenced by the fact that some of the railroads participate in the joint rail-water-rail operations of Seatrain, and that the railroads hope to make sea-land rates noncompetitive with Seatrain, thus forcing Pan-Atlantic out of the Atlantic-Gulf trade. It states that many of the Seatrain rates are maximum rates prescribed for application by Seatrain in No. 28300, and that such rates cannot be condemned for application by Seatrain in the same manner that the railroads are seeking to have them condemned for application via Pan-Atlantic.

Seatrains takes the position that there is nothing of record to justify sea-land rates lower than Seatrain rail-

water-rail rates, and that sea-land truck-water-truck rates which are lower than Seatrain rates, either in the measure of the rate or by virtue of lower minimum weights, or both, are unjust, unreasonable, lower than competitively necessary, and therefore injurious to the rate structure and contrary to the national transportation policy. It asks that Pan-Atlantic be ordered to publish and maintain rates and minimum weights no lower than those maintained by and for the account of Seatrain in its rail-water-rail service.

The evidence shows that sea-land and Seatrain services, insofar as the water transportation is concerned, are substantially similar. Both transport cargo in containers on ocean vessels, in one case truck trailers and in the other, rail freight cars. In both, marine insurance is provided by the carriers. Both transport truckload or carload cargo from the consignor to the consignee in a single container without transfer of lading. A difference is that, unless the shippers and consignees are on sidings, door-to-door pickup and delivery cannot be made by rail car as in the case of motortruck trailers. Uncertainty of ocean transport, infrequency of sailings, and longer transit time than by TOFC, are factors present both in sea-land and Seatrain service.

Many shippers would not use sea-land service unless the sea-land rates were no higher than the Seatrain rates. One shipper at Syracuse, N. Y., whose plant was constructed for rail shipments, would prefer to ship by all-rail or by Seatrain, rather than by sea-land. At least one shipper would discontinue using Pan-Atlantic's service if the sea-land rates were increased above the Seatrain rates. This shipper and the others supporting Pan-Atlantic make no mention of the minimum weights attached to their sea-land and Seatrain rates, and as between sea-land and Seatrain the record does not justify the prescription of equal minimum weights. Seemingly, the same minima would not be practicable since sea-land shipments use trailer bodies as containers whereas Seatrain shipments move in railroad cars.

U It is the position of the water carriers herein that the proposed TOFC rates would precipitate a cycle of destructive competition, contrary to the national transportation policy. Seatrain states that if the TOFC rates are permitted to become effective it will publish immediately rail-water-rail rates reflecting reasonable differentials under the TOFC rates; that Pan-Atlantic could then be expected to publish rates no higher than Seatrain's rates and made differentially under the TOFC rates; and that the net result would be a rate relationship comparable to that now existing but on a substantially depressed basis. It stresses, what appears to us a reasonable conclusion, that the rate-cutting activity probably would not stop even at that destructive level, and that quite certainly a further vicious cycle of rate-cutting would ensue.

FOURTH SECTION APPLICATION NO. 34227.

Fourth-section application No. 34227 requests authority to maintain the proposed reduced TOFC commodity rates between specified points in eastern territory, on the one hand, and Dallas and Fort Worth, on the other, over the short tariff routes without observing the long-and-short-haul provision of section 4. The rates which would be maintained from and to the higher rated intermediate points are the present class or combination rates. The following are typical examples of the departures.

From Boston, Mass., to Dallas over the direct route composed of the lines of the Boston and Maine Railroad to Mechanicsville, N. Y., The Delaware and Hudson Railroad Company to Binghamton, N. Y., the Erie Railroad Company to Huntington, Ind., the Wabash Railroad Company to East St. Louis, Ill., and the Missouri Pacific Railroad Company beyond, the distance is 1,965 miles, and the proposed rate on candy and confectionery is 214 cents. Over this route to Bald Knob, Ark., and Terrel, Tex., 1,543 and 1,930 miles, respectively, rates of 236 and 272 cents will be maintained. From Lancaster, Pa., to Dallas over the direct route composed of the lines of the Pennsylvania

Railroad Company to East St. Louis, the Missouri Pacific to Texarkana, Tex., and The Texas and Pacific Railway Company beyond, the distance is 1,591 miles and the proposed rate 204 cents. Over this route to Arkadelphia, Ark., and Terrel, 1,311 and 1,555 miles, respectively, rates of 225 and 253 cents will be maintained.

The examples offered by the applicants indicate that the earnings over the direct routes would range from 21.8 to 31.6 mills a ton-mile, and from 39.2 to 47.4 cents per car-mile based on a single trailer per flatcar, and 78.4 to 94.8 cents per car-mile based on two trailers per flatcar.

While these earnings and the cost data previously discussed show that the rates generally would be reasonably compensatory, in view of the conclusions reached with respect to the justness and reasonableness of these proposed rates, the application will be denied.

I. AND S. DOCKET NO. 6906.

By schedules filed to become effective on April 3, 1958, and later, in these proceedings, Pan-Atlantic and the motor common carrier participants in its tariffs proposed to establish approximately 94 commodity rates for the transportation in sea-land service of numerous commodities,⁷ in trailerload, multiple-trailerload, and volume quantities, from, to, and between numerous points in the East, South, and Southwest. Upon protest of rail carriers in these areas, the operation of the schedules was suspended to and including November 2, 1958, and later, after which the schedules became effective.

The evidence used in computing costs in the instant proceedings is similar to that submitted in I. and S. Docket No. M-10415. Our cost finding section has considered this

⁷ Sewer pipe, paper and paper bags, petroleum products, clay tile, bottle caps, calcium sulphate, iron oxide, titanium, dioxide toilet preparations, glass bottles, laundry sour, red lead, mortar color, printing paper, synthetic plastics, paper fabric bags, paper boxes, clay n.o.i., rosin, canned goods, petroleum, lumber, oak flooring, roofing, ammunition, beer, drain tile, wallboard, and paraffin wax.

evidence and has restated the sea-land costs before us. The rationale of the restatement is substantially the same as that in I. and S. Docket No. M-10415. The conclusion is that the proposed rates equal or exceed the out-of-pocket costs for 85 of the listed 94 movements. Representative proposed rates and restated costs are shown in appendix C hereto.

In the restatement of costs, there are nine listed rates which yield less than the out-of-pocket cost. Pan-Atlantic states that it will seek authority to cancel two of these rates, both applying on petroleum products, from New Orleans to Miami and Melbourne, Fla., under investigation in I. and S. Docket No. 6906. Of the remaining seven rates listed in the restatement as not yielding out-of-pocket costs, two are on paper and bags, one on glass bottles, two on synthetic plastics, and two on beer. The rates on paper and bags are from Advance and Hodge, La., to Miami, in I. and S. Docket No. 6906 (109 cents, minimum 64,000 pounds, utilizing two trailers with 32,000 pounds each; out-of-pocket cost, 111 cents); the rate on glass bottles is from Lancaster, N. Y., to Miami, in I. and S. Docket No. M-11077 (184 cents, minimum 22,000 pounds; out-of-pocket cost, 186 cents); the rates on synthetic plastics are from Buffalo, N. Y., to Dallas and Forth Worth, in I. and S. Docket No. M-11077 (195 cents, minimum 30,000 pounds; out-of-pocket costs, 199 and 201 cents, respectively); and the rates on beer are from Philadelphia to Daytona Beach, Fla., in I. and S. Docket No. M-11259 (99 and 85 cents, minima 30,000 and 40,000 pounds, respectively; out-of-pocket costs, 119 and 106 cents).

Only the sea-land rates of Pan-Atlantic, and not the all-rail boxcar rates, are here under investigation. The rail carriers urge that regardless of whether we approve or disapprove the sea-land rates, there should be no prescription of a relationship between the sea-land and the all-rail rates. The rail carriers indicate that if the instant rates are approved, they may counter with reduced rates of their own.

Based on the costs before us, the sea-land rates here in issue generally, with the exception of the nine rates previously noted, are compensatory. The other listed 85 rates exceed out-of-pocket costs, and about 42 percent of them cover fully distributed costs.

I. AND S. DOCKET NO. M-11375

By schedules filed to become effective on June 9, 1958, and later, the respondents, Pan-Atlantic and the motor-carrier participants in its tariffs, proposed to establish 65 or more reduced commodity rates for the transportation in sea-land service of numerous commodities,³ in trailer-load, multiple-trailerload, and volume quantities, from and to points in the East, South, and Southwest. Upon protests of rail carriers and others, the operation of the schedules was suspended to and including January 8, 1959, in the title proceeding, and later in some of the embraced proceedings, after which dates the schedules became effective.

The proposed rates, with certain exceptions, reflect differentials, approximating 5 percent to and from interior points and 7 percent to and from the ports, under the over-land rates of rail or motor carriers. In no instance is Pan-Atlantic participating in traffic in competition with the rail or motor carriers except at rates differentially under the all-rail or all-motor rates. For example, when in 1958 a differential on canned foodstuffs from Crystal City, Tex., to Swedesboro, N. J., was removed by a reduction in the rail rate, all of the traffic, which had been handled previously by Pan-Atlantic, was diverted to the railroads.

The cost evidence submitted in these proceedings has also been considered by our cost finding section. Appendix D hereto contains examples of the costs of record as restated

³ Including copper cable, tires, wallboard, woodenware, chemicals, denatured alcohol, paint, floor covering, aluminum foil, glue, insulating material, synthetic plastics, printed matter, skates, iron or steel bars, petroleum oil, building paper, roofing and roofing material, aluminum articles, aluminum junk, iron or steel castings, and machinery.

by that section in accordance with accepted cost-finding principles. The cost evidence shows that none of the sea-land rates in issue are below out-of-pocket cost, and in most instances the rates exceed fully distributed cost.

In most instances on this traffic, according to the cost data of record, the railroads are the low-cost agency on an out-of-pocket basis, especially where the higher minimum weights are used. For example, on copper cable moving from New Haven, Conn., to Tampa, Fla., when the traffic moves at minimum weights of 30,000 pounds, Pan-Atlantic's restated costs are 97 cents per 100 pounds and the rail restated costs are 101 cents, so that Pan-Atlantic's costs are 96 percent of the rail costs. However, when the 60,000-pound minimum is used, Pan-Atlantic's costs remain at 97 cents because of the necessity of using two trailer boxes, while the rail costs decrease to 67 cents, or a ratio of sea-land to rail of 145 percent. No rail fully distributed costs are on this record, nor was any attempt made to show all-motor costs.

During September 1958, the Coast Guard reclassified the dead weight tonnage of the Pan-Atlantic vessels. The tonnage capacity of each vessel was increased by 500 tons, which according to Pan-Atlantic results in a substantial reduction in vessel cost per ton carried. We find that the sea-land rates equal or exceed the out-of-pocket costs for all movements, and are compensatory.

The protestants indicate that if the instant rates are approved, they intend to counter with reduced rates of their own.

SUMMARY AND CONCLUSIONS

The sea-land, Seatrain, and TOFC rates here under investigation, with the few exceptions noted, appear to be compensatory. Many of them are above the fully distributed costs shown, and, with the exceptions mentioned, all are above the out-of-pocket costs. The next, and the

most important, question is whether these rates constitute destructive competition.

As related, the sea-land rates of Pan-Atlantic, in general, are lower than the corresponding rail rates, but by lesser amounts than differentials which existed by reason of the rates formerly maintained in connection with Pan-Atlantic's break-bulk service. At the same time, Pan-Atlantic's costs of the sea-land operation are from \$10 to \$12 a ton less than the cost under its break-bulk service.

Unquestionably, Pan-Atlantic's former break-bulk service was inferior to rail service. While many of the service disadvantages of the former break-bulk operation have been overcome by the sea-land operation, the preponderance of the testimony on these records is to the effect that most of the shippers prefer rail service to sea-land service except at lower rates for the latter. The records show no instance of any traffic moving by sea-land except at rates lower than the rail rates. We must conclude, therefore, that, in order to attract traffic, the sea-land service must establish rates somewhat below those of the rail carriers from and to the same points, and that Seatrain, whose rates and service are comparable to Pan-Atlantic's, is in a like position.

In the prior report in I. and S. Docket No. M-10415 the division concluded that the proposed sea-land rates there under investigation would not be competitively destructive. As explained, the rail carriers do not attack that conclusion in their petition for reconsideration. We agree with the division, and we further conclude that the compensatory sea-land and Seatrain rates under investigation in the other proceedings also are not competitively destructive.

The proposed TOFC rates would be on a parity with the current sea-land rates, and, as indicated, are on the level of the motor common carrier rates, based on the assumption that the TOFC and sea-land services have many of the characteristics of overland motor service. The motor carriers agree that a differential of sea-land rates under TOFC rates is justified. They are not prepared to suggest what that differential should be.

Pan-Atlantic and Seatrain contend that the proposed TOFC rates are unlawful because they would wipe out existing differentials and place the rail rates on the exact level of the sea-land and Seatrain rates. They insist that they must have rates lower than the rail rates if they are to move any substantial volume of this traffic.

All of Pan-Atlantic's traffic is competitive. On the other hand, Pan Atlantic argues that the traffic which the railroads seek to retain or obtain in competition with Pan-Atlantic and Seatrain constitutes only a small part of their total traffic in the areas here affected, and that because of the volume of their noncompetitive traffic the railroads could, if permitted to do so, reduce their sea-land competitive rates to an out-of-pocket cost basis and make up most or all of the difference between that level and their fully distributed costs on other traffic.

Pan-Atlantic, if it is to continue in operation, must recover its fully distributed costs on the overall sea-land operations. Thus, if the differentially lower rates which Pan-Atlantic must maintain to attract traffic in competition with the railroads were forced by such competition to be reduced to a point where, in general, they failed to recover operating costs plus a reasonable return, obviously its sea-land operations would become unprofitable and their continuance would be threatened.

Pan-Atlantic insists that under the act, interpreted in the light of the national transportation policy, we are required to prescribe a differential in its favor in order to preserve its operations as an essential part of the national transportation system. It seeks a minimum differential in its favor of 10 percent under the rail TOFC rates, and concedes that its differential under the rail boxcar rates should be somewhat less. It states that experience has shown, generally speaking, that a 5-percent differential, sea-land under rail boxcar rates, is the minimum that will permit sea-land participation in the traffic.

Seatrain asks that whatever action we may take in prescribing a relation between the sea-land and rail rates, such action be given effect through the medium of a mini-

imum rate order which will preserve the differentials now enjoyed by Seatrain in competition with the railroads.

The restated sea-land costs, both out-of-pocket and fully distributed, are below the restated TOFC costs for all movements on which the proposed TOFC rates would apply, as computed for flatcars with a single trailer, and also for all but 2 of the 66 movements computed for 2 trailers on a TTX car. Comparing the rail boxcar service with sea-land, on some of this traffic, particularly port-to-port traffic and certain other traffic subject to the higher single-trailer minima, Pan-Atlantic is shown as the low-cost agency; on the other traffic, the railroads' costs appear to be lower. No witness hazarded a guess as to the probable division of the TOFC traffic under the proposed rates as between single-trailer and two-trailer movement. The rail costs of transporting TOFC shipments would of course vary considerably depending upon whether a flatcar carrying only one trailer or a TTX car carrying two trailers were used; the choice of the equipment used would rest entirely with the railroads. Also, a shift from one port to another by Pan-Atlantic, which is frequently required by the peculiarities of the service, can effect a substantial change in the water-carrier costs on any of this traffic. Moreover, we do not have before us the rail costs as to many of these rates; and, as discussed in detail in the prior report, other considerations enter into the factor of inherent advantages. For the foregoing reasons, we cannot determine on these records where the inherent advantages may lie as to any of the rates in issue. We must recognize, also, that cost is only one of the elements which may appropriately be considered in passing upon the lawfulness of rates. In the exceptional circumstances here presented, other considerations, herein discussed, appear to us determinative of the issues.

In dealing with competitive rates, section 15a(3) prohibits us from holding the rates of a carrier to a particular level to protect the traffic of another mode. That prohibition, however, is qualified by the words "giving due consideration to the objectives of the national transportation policy declared in this Act." Clearly, the prohibition

does not mean that rates which fail to meet other standards of lawfulness in the act, interpreted in the light of the national transportation policy, must be approved because an effect of their disapproval might be to protect the traffic of a competing mode. It is the declared national transportation policy, among other things, to provide for fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service, and foster sound economic conditions in transportation and among the several carriers, all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

Since the enactment of section 15a(3) in 1958, we have had occasion to apply its provisions in a number of situations where rate reductions motivated by intermode competition were under consideration. We have refused to condemn the compensatory rates of carriers even though they were reduced below the prevailing level of the rates of competing modes, in the absence of a showing of unlawfulness under the act. See *Lumber, California and Oregon to California and Arizona*, 308 I.C.C. 345; *Paint and Related Articles in Official Territory*, 308 I.C.C. 439; *Sugar to Ohio River Crossings*, 308 I.C.C. 167; *Magnesium from Velasco, Tex., to East St. Louis, Ill.*, 309 I.C.C. 659. None of the prior proceedings, however, presented a situation such as that before us here. The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence, of the coastwise water-carrier industry generally.

The record shows that where there were 19 companies with 139 vessels operating in the Atlantic-Gulf coastwise trade prior to World War II, today only 2 deepwater common carriers are operating in that trade with 7 vessels,

3 by Pan-Atlantic and 4 by Seatrain. And where approximately 8.5 million tons annually were transported in the Atlantic-Gulf coastwise trade prior to the war, the present capacity of the remaining vessels in that trade is only 1.8 million tons. In 1959, Pan-Atlantic's total tonnage, coastwise and Puerto Rican trades, approximated 600,000 tons, as compared with over 1,000,000 tons coastwise alone in 1941. At the outset of World War II, all of the vessels employed in the deepwater coastwise trade were taken over by the Federal Government for national defense.

The importance of coastwise shipping for national defense purposes has been emphasized repeatedly from various governmental sources. Thus, the United States Maritime Administration in "A Review of the Coastwise and Intercoastal Shipping Trades," published in December 1955, stated, in part:

In short the crux of the coastwise-intercoastal shipping problem is in the break-bulk dry-cargo trade today as it was before the war. The reestablishment and preservation of this segment of the domestic fleet is of vital national defense importance if the immediate needs of a future grave national emergency are to be met. It is obvious that the ready availability of ships employed in domestic operations may well be a critical factor in any initial military or civil defense operation of the United States occasioned by a future atomic or thermonuclear war.

Further, an economically sound, low-cost domestic fleet will continue to make important contributions to the economic growth and development of the United States as a whole and a balanced national transportation system in particular.

In a report on domestic water carriers by the Committee on Interstate and Foreign Commerce of the Senate, entitled "1950 Merchant Marine Study and Investigation", made

pursuant to Senate Resolution 50, Report 2494, 81st Congress, 2d session,⁹ that Committee said, at page 17:

One fact stands out, and that is the essentiality of coastal water service to shippers the country over. . . .

Finally, of course, is the importance to national defense of having domestic tonnage readily available in an emergency. This fact must not be overlooked in discussing the importance of this segment of the merchant marine in terms of national policy.

As indicated in the next preceding quotation, coastwise shipping is important also for general public use as an integral part of the national transportation system. The following taken from *War Shipping Administration T. A. Application*, 260 I. C. C. 589, 591 (1945), is true today:

The dependency of ports and coastal areas upon the existence of water transportation is well known. The economy of such areas, to a large extent, is founded upon the availability of such transportation, without which a large part of their economy would not have been developed, and with the discontinuance of which a large part of their normal economic activity will cease to exist.

Section 307(f) of the act provides that in prescribing just and reasonable rates by water, we shall give due consideration, among other factors, to the effect of the rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable water carriers, under honest, economical, and efficient

⁹ Quoted by the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Interstate and Foreign Commerce in its report, dated August 29, 1960, on the "Decline of the Coastwise and Interoceanic Shipping Industry," 86th Congress, 2d session.

management, to provide such service. The provisions of this paragraph are similar to those in sections 15a(2) and 216(i). Also, section 305(c) provides that "Differences in the . . . rates . . . and practices of a water carrier in respect of water transportation from those in effect by a rail carrier in respect to rail transportation shall not be deemed to constitute . . . an unfair or destructive competitive practice."

Section 307(d), in authorizing the Commission to establish through routes and joint rates in connection with water and rail carriers, provides that "where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water." While this provision is not controlling here, where the rates by water under investigation were voluntarily established, and most of them apply in connection with a water carrier and motor carriers, nevertheless, considered with the other provisions of the act above mentioned, it appears indicative of the congressional intent that, where necessary to permit an essential, efficiently operated water carrier to participate in the economical movement of traffic, the service in connection with the water carrier should be accorded some advantage in the form of lower rates. This is so not only on traffic between the ports, but also to and from interior points, for coastwise carriers cannot survive on port-to-port traffic alone. As stated in *Deming Rates from Eastern Ports to the Southwest*, 264 I. C. C. 551, 559:

The steamship lines plying between north Atlantic and Gulf ports must, in order to operate successfully, participate in the handling of traffic to and from interior points. In order to participate in such traffic, the rates over such lines must be on a lower level than those over all-rail routes.

There is no contention that the coastwise lines here before us are not efficiently operated. Shipper evidence on

these records is indicative of a need by the general public for the services of those lines, and that they represent an important and essential part of a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense. There is, of course, a limit beyond which these carriers cannot be expected to attract traffic from interior points at economical rates. We are satisfied that their rates here under investigation, except as noted in the findings herein, do not go beyond that limit.

In the circumstances presented here, we are of the opinion that the objectives of the national transportation policy require the establishment and maintenance of a differential relationship between the rates under investigation on sea-land and Seatrain service, on the one hand, and the rates of the rail carriers, on the other, which will allow these water carriers operating in the coastwise trade to maintain rates that will enable them to continue efficient and economical coastwise service.

It appears to us, however, that the 10-percent differential sought by Pan-Atlantic would be excessive. The differences between the sea-land and the all-rail services are not so marked as to require that wide a rate difference. In our judgement, the rail TOFC rates on the commodities from and to the points concerned in I. and S. Docket No. 6834 should be maintained on a level no lower than 6 percent above Pan-Atlantic's sea-land rates, so long as the latter are not increased above their present levels. While the matter of an appropriate differential for sea-land service or Seatrain service under rail boxcar service is not here directly in issue, it may be helpful for the future guidance of the parties to express our view that, as boxcar service is inferior to TOFC service, the differential under the boxcar rates should be somewhat less than 6 percent.

Upon reconsideration, in I. and S. Docket No. M-10415 and the proceedings embraced therein we affirm the prior findings that 11 of the rates under investigation on the commodities from and to the points shown in footnote 4

of this report are not shown to be just and reasonable, and that the other rates under investigation are lawful.

In I. and S. Dockets Nos. 6906 and M-11375, and proceedings embraced therein, we find that nine of the rates under investigation, on the commodities from and to the points shown in the footnote,¹⁰ are noncompensatory and thus are not shown to be just and reasonable, and that the other rates under investigation are lawful.

In No. 32313, we find that the sea-land rate of 216 cents, minimum 20,000 pounds, on paint and paint materials from Baltimore to Dallas and Fort Worth, is unjust and unreasonable, and that the other sea-land rates and the Seatrain rates under investigation are lawful.

In I. and S. Docket No. 6834, we find that the proposed reduced TOFC rates are not shown to be just and reasonable, and the proposed schedules will be required to be canceled, without prejudice to the filing of new schedules in conformity with the conclusions herein. Since these proposed rates are not shown to be just and reasonable, the fourth-section application for relief to establish such rates will be denied.

Appropriate orders will be entered.

COMMISSIONER HUTCHINSON, concurring:

I am in general agreement with the majority report.

In I. and S. Docket No. 6834, the majority concludes that on a fully distributed basis, sea-land is a lower cost service than TOFC. Thus the ultimate effect of approval of the schedules would be to allow rates of the high-cost carrier to gravitate to a level whereby the low-cost carrier will be forced to go below its full costs in order to participate in the traffic.

A regulated competitive mode of transport maintaining rates not in excess of maximum reasonableness should not

¹⁰ Paper and paper bags from Hodge and Advance, La., to Miami, Fla.; petroleum products from New Orleans, La., to Melbourne and Miami, Fla.; glass bottles from Lancaster, N. Y., to Miami; synthetic plastics from Buffalo, N. Y., to Dallas and Fort Worth, Tex.; and beer from Philadelphia, Pa., to Daytona Beach, Fla.

publish reductions resulting in revenue losses, for the sole purpose of obtaining traffic being handled by another mode. Such proposals constitute, in my opinion, destructive competitive practices which the national transportation policy condemns.

I am not convinced, however, that a differential of 6 percent is warranted on this record, but since I do not believe the "without prejudice" finding constitutes an effective prescription of a differential, I concur in the majority decision.

COMMISSIONER MCPHERSON, concurring in part:

I would approve all the rates which are compensatory, but on this record I would not impose any differential.

COMMISSIONER FREAS, whom CHAIRMAN WINCHELL and COMMISSIONER WEBB join, dissenting in part:

My views concerning the issues presented in I. and S. Docket No. M-10415 have been set forth in a separate expression to the prior report of division 3 in this proceeding, 309 I. C. C. 587,606. The same reasoning is in general applicable to the other proceedings embraced herein. I shall therefore confine my remarks to the additional points raised by the parties and by the majority in its Summary and Conclusions.

With one possible exception, neither respondents nor protestants appear to dispute the basic concepts set forth in my prior expression, particularly those dealing with the guiding principles to be followed in competitive ratemaking. The railroads do contend that these principles go too far and overlook a tremendous impetus which they would give to private carriage. Apparently the railroads believe that the effect of those principles would be to require the return of fully distributed costs in every instance. That anyone should place such a construction upon my prior expression was wholly unexpected. The views expressed dealt with the situation at hand which is limited to intermode competition between regulated carriers. The standards set forth in no way preclude action necessitated by either the existence or the threat of exempt transportation.

Pan-Atlantic merely asserts that my suggestion as to cancellation and refileing of rates in conformity with the guiding principles would not be "practicable" here. It contends that because of the strong conflict between the parties concerning the relative values or advantages of the respective services to the shipping public unavoidable litigation would in most instances follow such refileing. This contention is not directed to the principles involved but to the evidentiary facts. The determination of these factual issues would be relatively simple were it not for the broad scope of the proceedings here, which involve hundreds of different commodity rates. The burden of proof is on respondents; in the absence of a clear showing of representativeness, orderly regulatory processes preclude the approval of differentials in all instances upon justification only of some.

In support of its conclusion that rate differentials, rail over water, are warranted here, the majority appears to rely heavily upon the national transportation policy. It is said that the differentials are necessary in order to allow the coastwise lines to continue their essential service. Specifically the majority stated: "Shipper evidence on these records is indicative of a need by the general public for the services of those lines, and that they represent an important and essential part of a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense." However, all that the record indicates in this regard is that although in certain instances shippers may consider the advantages or disadvantages of the respective services offered, the controlling factor in choosing between the involved modes of carriage is generally the level of the rates. There is no evidence here that either the commerce of the United States or the national defense would be hampered unless the water carriers, though not shown to have the inherent advantage in many instances, are given an artificial rate advantage. A reiteration of some of the language contained in the national transportation policy is in and of itself no substitute for essential supporting evidence. See *Pacific Inland*

Tariff Bureau v. United States, 129 F. Supp. 472. Nor are there any subsidiary findings in the report to substantiate any of the specific differentials proposed by the water carriers or suggested by the majority.

The decision of the majority may well be taken to stand for the proposition that water carriers are ordinarily entitled to rate differentials regardless of the circumstances of the specific case. I do not read the statute to require as a matter of law, or even to permit, blanket protection from reasonable competition for the water carriers, or for that matter for any mode of transportation. Indeed, even the water carriers have not gone this far in their construction but have, in the last Congress, sought legislation to that effect.

APPENDIX A

Rates, costs, and cost ratios

Commodity	Min. Rate	Sea-land						Trailer-on-flatcar										Ratios			
		Costs		Ratio, rate to costs		OP	FD	Costs		OP	FD	Ratio, rate to costs		OP	FD	SL to TOFC costs		OP	FD		
		OP	FD	OP	FD			RR	TTX			RR	TTX			RR	TTX			RR	TTX
Ammunition, from New Haven, Conn.	30	299	138	175	217	171	30	299	214	186	259	231	140	161	115	129	64	74	68	76	
Candy or confectionery from Boston, Mass.	36	214	139	179	154	120	36	214	190	172	236	218	113	124	91	98	73	81	76	82	
Paint and paint materials from Jersey City, N. J.	36	190	111	137	171	139	36	190	182	166	225	209	104	114	84	91	61	67	61	66	
Printed matter from Philadelphia, Pa.	23	273	172	212	159	129	23	273	250	204	292	246	109	134	93	111	69	84	73	80	
Wire goods, aluminum from York, Pa.	14	438	281	334	156	131	30	438	345	246	386	287	127	178	113	153	81	114	87	116	

SL is sea-land; T O F C is trailer-on-flatcar; T O F C rates are proposed; Min. is minimum weight in 1,000 pounds; ratios are in percents; OP is out-of-pocket; FD is fully distributed; RR signifies railroad-owned flatcars with a capacity of one trailer; TTX signifies leased flatcars with a capacity of two trailers; destination of shipments is Dallas-Fort Worth.

APPENDIX B.

*Rationale of cost finding section.***Cost evidence:**

Cost evidence relating to the trailer-on-flatcar service was introduced by the southwestern rail carriers, eastern rail carriers, and by the protestant, Pan-Atlantic Steamship Company. The eastern rail carriers introduced a cost study for TOFC service based almost wholly on cost factors introduced by the southwestern rail carriers. Since the cost evidence of the southwestern rail carriers will be discussed in detail below, further comments on the eastern rail carriers' cost evidence is considered unnecessary.

The Missouri Pacific Railroad Company introduced revenue and expense data intended to show that the proposed TOFC rates would produce compensative revenue when compared with the average revenue and operating expenses of carriers in the central, western, and southwestern regions. The revenues and expenses were shown on a per ton-mile and a per car-mile basis for all traffic combined. In addition to not providing a separation of the expenses between terminal and line-haul and between out-of-pocket and fully distributed, these figures do not reflect the special characteristics of TOFC traffic, and, therefore, are without probative value in measuring the compensatory nature of the proposed rates.

The southwestern rail carriers originally presented cost data for the TOFC service with costs based on handling one trailer per flatcar, two trailers per flatcar, and with percentages of empty return of zero, 50, and 100 percent. Subsequently additional evidence was introduced which superseded the original presentation. This latter evidence was based on costs for the year 1956 from Statement No. 2-58 of the Bureau of Accounts, Cost Finding and Valuation, and adjusted by respondent to a level of May 1, 1958. It compares out-of-pocket costs with the proposed rates for one trailer per car, for two trailers per car, and on a combined basis reflecting 75 percent two trailers per

car and 25 percent one trailer per car. The empty return ratio used for the line-haul expense was 25 percent. The respondent considered the combined showing to be the most appropriate, although it conceded that such a performance was not presently attained. Based on respondent's cost presentation the proposed rates exceed out-of-pocket costs for all movements.

The protestant water carrier took many exceptions to respondent's cost presentation and restated the costs. A comparison of the proposed rates with the protestant's restated out-of-pocket costs showed most of the rates to be below out-of-pocket cost.

In order to more fully understand the cost elements involved herein a short description of the services rendered the TOFC traffic may be helpful. At point of origin the trailer is loaded at the shipper's dock and then moved to the ramp area of the originating railroad. The trailer is subsequently loaded onto the flatcar and is tied down or made secure to the car. Upon completion of the loading the cars are switched from the ramp to the outbound train along with other types of cars. The train is then given a line-haul movement to the western gateway where the TOFC cars are switched to the delivering railroad's ramp, and the trailers are untied and removed therefrom. At the present time the TOFC cars are not interchanged between the railroads so that direct movement of the trailers is required for delivery to the connecting line. After delivery to the connecting carrier's ramp the trailers are again placed on flatcars and tied down and subsequently moved to final destinations, where the cars are again switched to a ramp, the trailers untied and removed, delivered to the consignee and unloaded, and returned to the railroad terminal. So far as these proceedings are concerned two types of cars are involved: one is a flatcar of single trailer capacity which is equipped with tiedown devices; and the other is a car especially designed to hold two trailers with special holddown devices. The latter type of car is at present not owned by the railroads but is leased from a car company under mileage agreement and is referred to

as a trailer-train car. The abbreviation of TTX will be used herein in referring to the two-trailer cars while the single-trailer cars will be referred to as R. R.-owned cars.

In view of the many points of controversy over the cost evidence in these proceedings, each element of cost will be discussed individually below with the comments and evaluation by the cost finding section immediately following each item.

(1) Source and level of expense data:

RESPONDENT.

In its final cost presentation respondent based its rail costs on unit expenses shown in Statement No. 2-58 of the Bureau of Accounts, Cost Finding and Valuation, which showed costs for the year 1956 and also costs adjusted to a level of January 1, 1958. Respondent considered the costs as of January 1, 1958, to be overstated, and therefore used the 1956 costs adjusted to what it purported to be a May 1, 1958, level. This was accomplished as follows: The total operating expenses for the year 1957 were related to the total operating expenses for the year 1956 for the eastern district and western district separately. The percent of increase was found to be 1.57 percent for the eastern district and 0.83 percent for the western district. A cost-of-living adjustment of 4 cents per hour as of May 1, 1958, was applied to the total service hours for the year 1957, United States as a whole, and the resulting amount of increase was related to the total operating expenses for the year 1956 for the United States as a whole to produce an additional adjustment of 1.14 percent. The latter amount was added to the previous percentage increases for the eastern and western districts to produce total adjusting percentages of 2.71 percent for the eastern district and 1.97 percent for the western district. These percentage adjustments were applied to the expenses for 1956 by respondent to produce costs as of May 1, 1958.

Respondent showed costs on an out-of-pocket level only. It contends that the amount of additional revenue which a commodity should produce above out-of-pocket cost should

be contingent upon what the traffic can bear rather than on an arbitrary prorata based on averages of all traffic. Therefore, it did not show fully distributed expense.

PROTESTANT.

In its restatement of the rail costs in respondent's exhibit No. 3 protestant used the costs for the year 1955 shown in Statement No. 1-57, issued by the Bureau of Accounts, Cost Finding and Valuation, and underlying working papers thereto. These costs were adjusted for wage and price levels to January 1, 1958, based on data shown by rail carriers in Ex Parte No. 212.

Protestant showed its costs both on an out-of-pocket and fully distributed basis. The out-of-pocket costs include 80 percent of the operating expenses, rents, and taxes, excluding Federal income taxes, plus a return of 4 percent after Federal income taxes, and 50 percent of the road property and 100 percent of the equipment. The fully distributed costs include, in addition to the out-of-pocket costs, the remaining 20 percent of the operating expenses, rents, and taxes, the passenger train and less-than-carload operating deficits and return of 4 percent after Federal income taxes on the property as a whole. The revenue needs over and above the out-of-pocket costs are given a prorata ton and ton-mile distribution over all revenue traffic without distinction as to kind or class.

COST FINDING SECTION'S COMMENTS.

The method used by respondent to adjust the 1956 expenses to a May 1, 1958, level completely ignores the amount of traffic moving in the respective years because only the total operating expenses and a cost-of-living adjustment are used to obtain the final adjusting factors. Respondent's method of adjustment is unacceptable.

The method of adjustment to a level of January 1, 1958, used by protestant assumes the same level of traffic for both periods but adjusts for the level of wages and prices. When the adjustment is made in this manner for only a 1-year period there is small likelihood of error. However,

when such adjustment is made for 2 years or more there is a possibility of overstatement since any increase in efficiency of operations is ignored.

In view of the fact that the sea-land costs reflect 1957 expenses and the TOFC pickup and delivery, tiedown cost and trailer rental expenses are based generally on the year 1957, the remaining TOFC expenses should also reflect a level for the year 1957. Accordingly the cost finding section believes that the costs shown in its Statement No. 2-58, which are based on the year 1956 operations with adjustment to reflect wage and price levels as of January 1, 1958, are appropriate for use herein and these costs have been used in the restatement of respondent's and protestant's cost evidence. (A check of the costs shown in cost finding section's Statement No. 5-58, which shows cost based on expenses for the year 1957, indicates very close agreement between those costs and the costs as of January 1, 1958, shown in Statement No. 2-58. The costs in Statement No. 5-58 would have been used in the cost finding section's restatement except for the fact that this statement is not of record). The out-of-pocket cost is the significant measure as to whether or not a rate is compensatory, but for comparative purposes we have also supplied the fully distributed costs in our restatement.

(2) Switching at origin and destination:

RESPONDENT.

For the cost of switching at the TOFC ramps, respondent used one-third of the territorial average switching time. The factor of one-third was based on data furnished by the Pennsylvania Railroad Company and the Baltimore and Ohio Railroad Company in the East, and the Texas and New Orleans Railroad Company, Texas and Pacific Railway Company, St. Louis Southwestern Railway Company, and Missouri Pacific Railroad Company in the Southwest. In computing the switching expense per car respondent included an allowance of 25 percent for switching empty cars.

PROTESTANT.

Protestant contended that the data supplied to respondent by the various railroads were deficient in that they did not make allowance for switching of the empty car or for nonproductive time of the yard locomotives. Protestant stated that the switching data used by respondent was, in some instances, based on estimates, and it contends that a detailed study should have been made to determine the switching time of the TOFC traffic. The protestant restated the switching minutes to include an allowance for switching of empty cars equal to the number of loaded cars and for nonproductive time. In the eastern district, protestant's restated figure amounted to 12.9 minutes per car which, when related to the territorial average of 30 minutes per car, produced a ratio of 43 percent. Protestant used 45 percent of the territorial average in its restatement. In the western district, protestant used a restated figure of 16.4 minutes per car which, when compared with the total average of 26 minutes per car, produced a ratio of 63 percent. Protestant used a ratio of 65 percent in its restatement.

COST FINDING SECTION'S COMMENTS.

We believe that respondent should have made detailed switching studies to determine the switching minutes per car for the TOFC traffic. In its restatement of respondent's switching minutes for the eastern district, the protestant used only the minutes for the Pennsylvania Railroad Company at Kearny, New Jersey, Pittsburgh, and Philadelphia, and for the Baltimore & Ohio at Philadelphia. It ignored the time at St. Louis of 2.1 minutes per car submitted by the Pennsylvania in a letter to protestant under date of March 25, 1958, which is part of the working papers that parties agreed could be used. When this time is taken into account and adjusted for empty and nonproductive time, the average switching minutes in the eastern district is reduced from 12.9 minutes to 11.4 minutes. The cost finding section does not agree with protestant's use of

100 percent allowance for empty switch which is normal for other than boxcar traffic. Once the loaded TOFC cars have been placed in the ramp there is no need to switch them away from the ramp until they are to be made up into a returning train except in those instances where the capacity of the ramp is limited to less than the total number of cars received. Except for reference to the four-car capacity of the Baltimore & Ohio TOFC ramp at Philadelphia, the record does not provide evidence as to this necessity and, in the absence thereof, the cost finding section believes that an allowance for switching empty cars equal to the amount of empty movement that is present in the line-haul operation is appropriate. Therefore, we have adjusted protestant's switching minutes to reflect 25 percent empty switching in the Eastern district and 50 percent empty switching in the western district. The use of these empty return ratios is discussed in a subsequent item. The adjusted switching minutes per car compute to 7.13 minutes in the East and 12.30 minutes in the West. When related to the territorial average minutes per car of 30.6 in the East and 26.7 in the West shown in statement No. 2-58, the ratio of TOFC switching minutes to the territorial average becomes 23 percent for the East and 46 percent for the West.

(3) Freight-train car costs:

RESPONDENT.

Respondent used a ratio of 45 percent of the territorial average for the freight-train car costs of railroad-owned cars. This was based on an average detention at origin and destination combined of 1.7 days as compared to the territorial average of 3.75 days. Respondent made no distinction between railroad-owned cars and privately owned cars.

PROTESTANT.

Protestant also used a ratio of 45 percent of the territorial average for railroad-owned cars. The protestant

developed the rental expense per car-mile for the TTX cars separately and the freight-train car costs for these cars is reflected in the line-haul expense.

COST FINDING SECTION'S COMMENTS.

In its restatement of the costs the cost finding section has used 45 percent of the territorial average for the TOFC freight-train costs for railroad-owned cars and has used protestant's treatment for the TTX cars.

(4) Carload station clerical expense:

RESPONDENT.

Respondent included carload station clerical expense based on 50 percent of the territorial average for the East and for the West.

PROTESTANT.

Protestant included this expense in total for each territory.

COST FINDING SECTION'S COMMENTS.

In view of the fact that the TOFC traffic is interchanged between the eastern district and the western district and would move on through billing respondent's treatment is proper and has been followed in the cost finding section's restatement.

(5) Loss and damage expense:

RESPONDENT.

Respondent included the territorial loss and damage clerical expense and the loss and damage claim payments based on the United States average for all other manufacturers and miscellaneous articles and for alcoholic beverages or liquor separately.

PROTESTANT.

Protestant also included loss and damage clerical expense and loss and damage claim payments except that protestant included the loss and damage claim payments for each territory rather than once for the entire movement.

COST FINDING SECTION'S COMMENTS.

In obtaining the loss and damage clerical expense from the carload unit cost sheets protestant used the expense per ton shown therein for an expense per hundredweight. Protestant's expenses of 0.599 cent for the eastern district and 1.472 cents for the western district should have been 0.030 cent and 0.074 cent, respectively. The loss and damage claim payments should have been included only once for the entire movement since these figures are based on United States averages without regard to length of haul. The loss and damage clerical expense and the loss and damage claim payments have been included correctly in our restatement.

(6) Interchange expense:**RESPONDENT.**

The costs from Statement No. 2-58 include interchange expense in the line-haul expense based on a cost per car-mile. The statement provides for eliminating the interchange expense per car-mile and stating it on a per interchange basis where such treatment is desired. Respondent has availed itself of this option and has included interchange expense based on 1.5 interchanges per loaded move in the East and 0.5 interchange in the West, subsequently increased for the empty movement. Over-the-street trailer interchange cost at the gateway point between eastern and western territories is included separately. Respondent contends that interchanges between certain carriers do not entail the switching and cost normally associated with interchange service and that they are merely paper transactions for division of revenue purposes. This would be

true for interchanges between the Missouri Pacific and the Texas and Pacific, the Atchison, Topeka and Santa Fe Railway Company and the Gulf, Colorado and Santa Fe Railway Company and the Kansas City Southern Railroad Company and Louisiana & Arkansas Railway Company, and would also be true of certain interchanges in the East. Respondent stated that in the western district it could not foresee any interchanges other than the so-called paper interchanges of TOFC traffic destined to Dallas or Fort Worth as between the western district carriers, since the carriers named above provide direct routes between the gateways and Dallas and Fort Worth.

PROTESTANT.

Protestant takes exception to respondent's reduction of the number of interchanges. It contends that even though complete switching service may not be required for those points referred to as paper interchanges there is still some cost associated with such service which should be included. In developing the line-haul cost, the protestant has used both a shortest route and a longest route over actual rail lines and has included the expense for the actual number of interchanges required over each, including so-called paper interchanges.

COST FINDING SECTION'S COMMENTS.

Respondent is correct in its contention that the cost for a paper interchange is considerably less than the cost for an interchange where normal switching is involved. However, the elimination of the entire cost for the paper interchanges is not considered proper, considering the fact that the interchange costs in Statement No. 2-58 are based on all types of interchanges as reported by the carriers. Thus, if the cost for paper interchanges were to be excluded the remaining interchange cost would have to be based on the expense per actual interchange which would be somewhat higher than the cost shown in Statement No. 2-58.

Protestant is wrong in including an interchange expense for the transfer of cars between the Atchison, Topeka & Santa Fe and the Gulf, Colorado & Santa Fe railroads. Because these two roads operate and report as a system, the transfer of cars between them is not reported as an interchange. The expense for the transfer is reflected as intertrain or intratrain switching which protestant has included fully on a car-mile basis.

In its restatement the cost finding section has included the average interchange costs expressed on a car-mile basis with the line-haul expenses. Since the interchange at the gateways between the East and West is performed by interchange of the trailer only and not of the rail car, a reduction equivalent to one-half the cost of a full interchange has been applied to the terminal costs in each territory. The effect of this treatment is to include roughly 0.6 interchange for a 900-mile haul in the West and from 1.8 to 2.6 interchanges for hauls of 900 to 1,200 miles, respectively, in the East.

(7) Intertrain and intratrain switching:

RESPONDENT.

Respondent included intertrain and intratrain switching on a per car-mile basis but included only 50 percent of the total shown in Statement No. 2-58. The use of 50 percent of the territorial average was not based on any special studies made by respondent but was based on respondent's belief that the trains in which the TOFC traffic moves are subject to less than average switching en route.

PROTESTANT.

Protestant included the intertrain and intratrain switching expense on the territorial average basis without reduction.

COST FINDING SECTION'S COMMENTS.

In view of the fact that respondent failed to introduce evidence showing that the TOFC traffic actually receives

less than the average intertrain and intratrain switching, the use of the territorial average expense for this service is considered to be proper and has been included in the cost finding section's restatement.

(8) Trailer rental expense:

RESPONDENT.

Respondent based its cost for trailer rental on an average charge of \$4 per day for a 1-day period of 6.7 days (round trip 13.4 days) plus an allowance for 25 percent empty return. This amounted to a total cost of \$33.50 per loaded trailer.

PROTESTANT.

The protestant stated that the elapsed time used by respondent did not take into consideration the fact that trailers may be idle over the weekend, and that there might not be 100-percent utilization of the trailers; therefore, it based its cost on a 14-day round trip or 7 days one way plus an allowance for empty return. Based on a rental cost of \$4 per day this produced a cost of \$44.80.

COST FINDING SECTION'S COMMENTS.

Testimony of record indicates that the running time between origin and destination would average 5 days, or 10 days for the round trip. An allowance of 2 days' time at the origin and at destination would appear to be reasonable. Therefore, in its restatement the cost finding section has used an allowance for trailer rental cost based on a 14-day round trip adjusted for empty return instead of a 13.4-day round trip by respondent. The trailer rental cost thus computed amounts to \$38.50 per loaded trailer. The allowance for empty return for trailer rental amounting to 37.5 percent is the average of 25 percent empty return in the East and 50 percent in the West. These percentages are discussed subsequently.

(9) Trailer interchange expense:

RESPONDENT.

Respondent based its costs for the over-the-street interchange of the trailer at the gateway between East and West on figures furnished by the Baltimore & Ohio and the Pennsylvania, the average of which computed to \$5.25 per hour. Allowing 1 hour for the interchange and adjusting for 25 percent empty return, respondent computed a total of \$6.56 per loaded trailer for the interchange.

PROTESTANT.

Protestant based its expense on figures furnished by the Pennsylvania, the Missouri Pacific and the Baltimore & Ohio and included allowance for 100 percent empty movement. A figure of \$24.90 was included for the Baltimore & Ohio, which combined with the amount of \$11.28 for the Pennsylvania and \$15.76 for the Missouri Pacific, produced an average of \$17.31 per loaded trailer.

COST FINDING SECTION'S COMMENTS.

The figure of \$12.45, excluding allowance for empty, as used by protestant for trailer interchange for the Baltimore & Ohio, appears to be excessive when compared with respondent's figure of \$4.85. The record does not provide information as to this discrepancy, therefore, the cost finding section has used respondent's figure of \$4.85 in its restatement. Protestant showed a figure of \$7.88 for the Missouri Pacific based on 1.5 hours at a cost of \$5.25 per hour. This latter figure has been included with respondent's figure to produce an average of \$6.12. When the latter amount is adjusted for an empty return amounting to 50 percent, a total cost of \$9.18 per trailer interchange is obtained. The latter figure is used in the cost finding section's restatement.

(10) Trailer tiedown and untie cost:

RESPONDENT.

Respondent used a basic cost for placing the trailers on the car and securing them and for releasing them and removing them from the cars of \$9 per trailer in the East and \$8 per trailer in the West. These figures were subsequently adjusted for 25 percent empty return giving total costs of \$11.25 per trailer in the East and \$10 per trailer in the West.

PROTESTANT.

After adjusting the figures furnished to respondent by the various railroads for a clerical cost item protestant used figures of \$9.60 per trailer in the East and \$8.50 in the West for the trailer train cars, and \$24.84 in the East and \$8.50 in the western district for railroad-owned cars.

COST FINDING SECTION'S COMMENTS.

It was brought out in the record that the figures used by the protestant for tie-down costs in the eastern district were based on figures furnished by the Baltimore and Ohio which included not only the service at the ramp but the movement of the trailers between the ramp and shipper or consignee. In order to correct for this overstatement by protestant the cost finding section has substituted the cost of \$9.60 as used by protestant for trailer train cars for the \$24.84 it showed for railroad-owned cars in the eastern district. In the western district the cost finding section has used protestant's figure of \$8.50 for both railroad-owned and TTX cars. After adjustment for the respective empty return allowances the total cost per trailer becomes \$12.00 in the East and \$12.75 in the West.

(11) Pickup and delivery expenses:

RESPONDENT.

The pickup and delivery costs include the movement of the empty trailer from the carrier's motor terminal to the

shipper's dock, the loading of the trailer and the return of the loaded trailer to the ramp at the origin point, and the movement of the loaded trailer from the ramp at destination to the consignee's dock, unloading, and the return of the empty trailer to the ramp or to the carrier's motor terminal. Based on data furnished by the participating railroads respondent developed costs of \$9 per load in the East and \$6.90 per load in the West for the movement of trailers between the ramps and shipper's and consignee's docks. The loading and unloading expense used by respondent was 12.8 cents per hundredweight in the East and 11.3 cents per hundredweight in the West.

COST FINDING SECTION'S COMMENTS.

The protestant used the respondent's figures in its cost presentation and the cost finding section has done likewise in its restatement.

(12) Weight of train for TOFC traffic:

RESPONDENT.

Respondent based its line-haul costs on those for through trains without adjustment for any reduction in the weight of the train for expedited service. Respondent contends that the TOFC traffic is generally handled in regularly scheduled through trains and thus should reflect the cost of through train operations.

PROTESTANT.

Protestant computed its line-haul cost of the TOFC traffic based on through train costs but with the weight of the train reduced by 25 percent. Protestant contends that the TOFC traffic moves in manifest trains and receives expedited service, and that such manifest trains normally operate with tonnage ratings which are from one-third to one-fourth less than other through trains because of the speed at which these trains are operated. It also cited movement by the Pennsylvania Railroad of the TOFC traffic from New

York to Philadelphia with only 10 or 12 cars in a train. It also stated that the Baltimore and Ohio trains in which the TOFC traffic is handled have tonnage ratings that have 25 percent to 30 percent less traffic than other through trains. The effect of protestant's treatment is to increase the gross-ton-mile portion of the line-haul expense by roughly 5 percent in the Eastern district and by 3 percent in the Western district.

COST FINDING SECTION'S COMMENTS.

Although it may be true that the TOFC traffic may receive expedited service in less than average weight trains in some instances protestant has not shown this to be true generally. With regard to the movement by the Pennsylvania of the TOFC traffic between New York and Philadelphia in small trains this movement comprises only a small part of the total movement from eastern points to the southwest, and it cannot be assumed that because such movement occurs over a short distance the same would be true for the remainder of the haul. In addition, the effect of protestant's adjustment on the total line-haul expense is negligible. In the absense of special studies which would show the actual average weights of trains in which the TOFC traffic is handled, the cost finding section believes that the use of the through train average cost is proper and this has been used in its restatement.

(13) Tare weight of cars and trailers:

RESPONDENT.

Respondent made no adjustment in its costs for the difference in tare weights of the cars used for TOFC service from the tare weight of ordinary flatcars. Also, it made no adjustment for the difference in weight for flatcars of two-trailer capacity from those of one-trailer capacity. In addition, it failed to include the tare weight of trailers in computing its expenses. It also failed to distinguish between railroad-owned cars and cars rented on a mileage basis.

PROTESTANT.

Protestant developed its costs for railroad-owned cars and for those cars rented on a mileage basis (TTX cars) separately. Based on figures furnished by several railroads concerned with the TOFC traffic it determined that the tare weight for railroad-owned cars was 55,200 pounds before addition of the tare weight of the trailer. After addition of the 11,500 pounds average tare weight of a trailer the total tare weight of the railroad-owned car becomes 66,700 pounds. For the TTX cars it determined the average weight to be approximately 78,000 pounds before addition of the trailer tare weight. Based on information furnished by the railroads, protestant determined that in the eastern district the TTX cars were loaded with an average of 1.7 trailers per car and in the western district the TTX cars are operated with an average of 1.45 trailers per car. The total tare weight of the TTX cars and trailers computes to 97,550 pounds in the eastern district and 94,675 pounds in the western district.

COST FINDING SECTION'S COMMENTS.

The respondent is in error in not recognizing the difference in tare weights between the type of cars and in not making allowance for the additional tare weight of the trailers. The use by protestant of the average number of trailers per car for the TTX cars is also considered to be proper because this reflects the average utilization of the cars. The cost finding section has used protestant's tare weights in its restatement except for a reduction of 800 pounds in the tare weight of TTX cars based on information in the working paper. It has used average number of trailers in the East of 1.7 trailers per TTX car and 1.5 trailers per TTX car in the western district in its restatement.

(14) Net load per TTX car:

RESPONDENT.

Respondent assumed a net load for cars carrying two trailers of twice the minimum weight per shipment.

PROTESTANT.

The protestant developed the net load for TTX cars by adding to the minimum weight per shipment an amount equal to 0.7 of an average weight per shipment taken as 30,000 pounds in the East and 0.45 of 30,000 pounds in the western district. The figures of 0.7 and 0.45 are derived from the average number of loaded trailers handled on TTX cars as described in item 13 above.

COST FINDING SECTION'S COMMENTS.

The use of twice the minimum weight by respondent is incorrect since it overlooks the fact that a trailer of one minimum weight may be handled with a trailer carrying an entirely different load on the same flatcar and also ignores the fact that the average utilization of the TTX cars appears to be less than the maximum possible of two trailers per car. The cost finding section has used protestant's procedure except that it has rounded off the figure of 0.45 to 0.50.

(15) Empty return ratio:

RESPONDENT.

Respondent developed its line-haul expenses using an allowance for empty return of 25 percent for the ratio of empty car-miles to loaded car-miles. This figure was based on judgment and reflects a long range viewpoint. It does not actually represent the empty return ratio experienced at the time the evidence was placed on record. Respondent feels that the figure of 25 percent is a reasonable figure to expect considering the increasing use of TOFC service.

PROTESTANT.

Based on information furnished by the participating railroads protestant used ratios of empty to loaded TOFC car-miles of 60 percent for railroad-owned cars in both the East and West, and 23 percent in the East and 100 percent in the West for TTX cars.

COST FINDING SECTION'S COMMENTS.

An examination of the working papers shows that in the eastern district the Baltimore & Ohio showed no empty trailer movement on its own cars in either direction during the month of January 1958. During the same month the Pennsylvania showed an empty return of 23 percent for its TTX cars. Based on these showings the cost finding section feels that use of a ratio of empty to loaded car-miles of 25 percent in the eastern district for both railroad-owned and for TTX cars is not unreasonable, and it has used this ratio in its restatement. The working papers also show that in the western district the Texas and New Orleans Railroad showed a ratio of empty to loaded car-miles of 49 percent for the months of October, November, and December, 1957, and January 1958 for railroad-owned cars. Other carriers in the western district showed a ratio of 100-percent empty return for both railroad-owned cars and TTX cars. The cost finding section believes that the high empty return ratios experienced in the western district will not remain static but will be reduced as the TOFC traffic develops. The TOFC service concerned herein is in reality a substitute for boxcar service. It is reasonable to assume, therefore, that the empty return ratio would approach that of boxcars. Statement No. 2-58 shows the ratio of empty to loaded car-miles for carload boxcar traffic to be 36 percent. The use of an empty return ratio of 50 percent for the western district is, therefore, considered to be reasonable and this has been used in our restatement.

(16) Line-haul miles:

RESPONDENT.

Respondent based ~~its line-haul miles~~ on the average short-line distance between the origin and the Chicago and East St. Louis gateways, and between the gateways and destination increased by 13 percent to allow for circuitry.

PROTESTANT.

Protestant computed costs for so-called shortest practicable routes and longest practicable routes.

COST FINDING SECTION'S COMMENTS.

If these proceedings did not involve fourth-section considerations, costs computed for respondent's mileages would suffice. Because fourth-section considerations are involved, the costs based on routes longer than the average are important to measure the compensativeness of the proposed rates over the more circuitous routes. Therefore, the cost finding section has used both respondent's average mileages and protestant's longest mileages in its restatement of the costs.

CONCLUSION.

Based on the relationship of present sea-land rates to the sea-land costs as restated for the commodities concerned herein, the present sea-land rates equal or exceed the restated out-of-pocket costs for all movements and exceed the fully distributed expense except for eight movements.

The proposed TOFC rates equal or exceed the restated out-of-pocket TOFC costs computed for hauls with average circuitry for all movements by TTX car and for all but six movements by railroad-owned cars. The proposed rates equal or exceed the fully distributed costs for 14 movements by railroad-owned cars and for 43 movements by TTX cars, out of the 66 rail movements. The restated sea-land costs,

both out-of-pocket and fully distributed, are below the restated TOFC cost for all movements of comparable weight.

For hauls with the greatest amount of circuitry the proposed TOFC rates equal or exceed the out-of-pocket costs for 33 of the movements on railroad-owned cars and for 62 of the movements on TTX cars. Based on information in the working papers for these proceedings, it appears that a greater number of trailers is carried on TTX cars than on railroad-owned cars.

APPENDIX C

Rates, costs, and cost ratios

[Rates and costs in cents per 100 pounds; ratios in percents; min. weights in 1,000 pounds; SL is Sea-Land; OP is out-of-pocket; FD fully distributed; PA is Pan-Atlantic; MC is motor carrier; AR is all-rail]

Commodity	Origins and destinations	SL		OP costs			FD costs			Ratio SL rates to costs		AR rate and costs		Ratios SL to AR costs			
		Min.	Rate	PA	MC	SUM	PA	MC	SUM	OP	FD	Min.	Rate	OP	FD	OP	FD
Sewer pipe	Sherman, Tex. to Clearwater, Fla.	152	124	59	53	112	68	69	137	111	91	36	133.5	88	114	127	120
Bottle caps	New York, N. Y. to Jacksonville	30	125	67	52	119	77	72	149	105	84	—	—	—	—	—	—
Paper fabric bags	New Orleans, La. to Orlando, Fla.	22	130	58	23	81	68	34	102	160	127	—	—	—	—	—	—
Rosin	Cross City, Fla. to New York, N. Y.	36	105	63	23	86	72	37	109	122	96	—	—	—	—	—	—
Canned goods	Fort Pierce, Fla., to Brewster, N. Y.	40	104	44	42	86	51	66	117	121	89	—	—	—	—	—	—
Petroleum	Baton Rouge, La., to Miami, Fla.	26	117	40	62	102	46	88	134	115	87	—	—	—	—	—	—
Paper boxes	Miami, Fla., to Philadelphia, Pa.	36	108	51	25	76	59	37	96	142	113	—	—	—	—	—	—
Ammunition	Bridgeport, Conn., to Alexandria, La.	30	289	68	60	128	79	84	163	226	177	—	—	—	—	—	—
Canned goods	Fort Pierce, Fla., to New York, N. Y.	40	94	57	22	79	65	36	101	119	93	—	—	—	—	—	—

¹ 26,000 pounds are used as load per trailer when two trailers used for 52,000 pounds.

NOTE—Rail costs are shown for those movements where protestants introduced rail costs. Rail costs are adjusted to reflect loss and damage claim payments, shown in Bureau of Accounts, Cost Finding and Valuation Statement No. 2-58, applicable to the commodities in question.

APPENDIX D

Rates, costs, and cost ratios

[Rates and costs in cents per 100 pounds; ratios in percents; min. weights in 1,000 pounds; SL is Sea-Land; OP is out-of-pocket; FD fully distributed; PA is Pan-Atlantic; MC is motor carrier; AR is all-rail]

Commodity	Origins and destinations	Sea-land		OP costs			FD costs			Ratio SL rates to costs		All-rail rate and costs		Ratio SL to AR costs	
		Min.	Rate	PA	MC	Total	PA	MC	Total	OP	FD	Min.	Rate	OP	OP FD ¹
Copper cable	New Haven, Conn., to Tampa, Fla.	{ 30	180	69	28	97	80	40	120	186	150	30	189	101	96 —
		{ 360	161	69	28	97	80	40	120	166	134	50	170	67	145 —
Floor covering	Kearney, N. J., to Monroe, La.	32	166	80	43	123	92	58	150	135	111	30	175	106	116 —
Roofing or building paper	Long Branch, N. J., to Galveston, Tex.	40	127	53	27	83	65	45	110	153	115	40	166	102	81 —
Roofing or roofing material	New Orleans, La., to Tampa, Fla.	380	41	41	—	41	47	—	47	100	87	80	43	25	164 —
Aluminum extrusions	Gulfport, Miss., to Trenton, N. J.	30	178	69	38	106	79	59	138	168	129	30	181	97	109 —
Iron or steel castings and forgings	Houston, Tex., to Buffalo, N. Y.	{ 40	152	62	70	132	71	96	167	115	91	60	160	71	186 —
		{ 380	146	62	70	132	71	96	167	111	87	60	160	71	186 —
Power transmission machinery	New Britain, Conn., to Lubbock, Tex.	20	318	110	143	253	127	179	306	126	104	24	335	162	156 —

¹ Rail fully distributed costs not shown.

² 30,000 pounds used as load per trailer when two trailers used for 60,000 pounds.

³ 40,000 pounds used as load per trailer when two trailers used for 80,000 pounds.

⁴ 24,000 pounds subject to rule 34 of the classification.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION,
held at its office in Washington, D. C., on the 19th day
of December, A. D. 1960.

INVESTIGATION AND SUSPENSION DOCKET
NO. M-10415

COMMODITIES—PAN-ATLANTIC STEAMSHIP
CORPORATION

INVESTIGATION AND SUSPENSION DOCKET
NO. M-10430

ADIPIC ACID—BOUTTE & LULING, LA., TO EAST

INVESTIGATION AND SUSPENSION DOCKET
NO. M-10431

COMMODITIES—SEA-LAND—LOUISIANA TO EAST—
P. A. S. S. CO.

INVESTIGATION AND SUSPENSION DOCKET
NO. M-10434

VARIOUS COMMODITIES—N. J., N. Y. & PA. TO
FLA. & TEXAS

INVESTIGATION AND SUSPENSION DOCKET
NO. M-10437

PULPBOARD-FIBERBOARD—EVADALE, TEX., TO
NEW YORK, N. Y.

INVESTIGATION AND SUSPENSION DOCKET
NO. M-10469

ALUMINUM ARTICLES—MASSENA, N. Y., TO TEXAS

INVESTIGATION AND SUSPENSION DOCKET
NO. M-10582

VARIOUS COMMODITIES, SEA-LAND, EAST TO
FLA., LA., TEX.

INVESTIGATION AND SUSPENSION DOCKET
NO. M-10599

PAPER—SOUTH TO N. Y. AND N. J.

INVESTIGATION AND SUSPENSION DOCKET
NO. M-10602

COMMODITIES—EAST TO ALA., FLA., AND TEXAS

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-10624**

**FOODSTUFFS—LA. AND MISS. TO CONN., MD., MASS.,
N. Y., PA., AND R. I.**

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-10679**

**FEED—FLORIDA TO NEW ENGLAND AND TRUNK LINE
TERR.**

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-10698**

**SEA-LAND—PAN-ATLANTIC S. S. CORP.—PLASTICS
& WIRE CLOTH**

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-10716**

BRUSHES—CONN., MASS., AND N. Y. TO TEXAS

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-10721**

**VARIOUS COMMODITIES—PAN-ATLANTIC STEAMSHIP
CORPORATION**

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-10722**

SEA-LAND—VARIOUS COMMODITIES—P. A. S. S. CO.

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-10825**

COMMODITIES—PAN-ATLANTIC SEA-LAND SERVICE

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-10945**

COMMODITIES—PAN-ATLANTIC STEAMSHIP CORP.

**INVESTIGATION AND SUSPENSION DOCKET
No. M-10946**

COMMODITIES—EAST, SOUTH & SOUTHWEST

**INVESTIGATION AND SUSPENSION DOCKET
No. M-10963**

**VARIOUS COMMODITIES—PAN-ATLANTIC
SEA-LAND SERVICE**

**INVESTIGATION AND SUSPENSION DOCKET
NO. 6847**

**FRESH OR FROZEN FOODS—SEA-LAND
PAN-ATLANTIC S. S. CORP.**

**INVESTIGATION AND SUSPENSION DOCKET
NO. 6848**

PAPER—ALA. TO FLA. AND FLA. TO TEXAS

**INVESTIGATION AND SUSPENSION DOCKET
NO. 6870**

ALUMINUM & PETROLEUM—TEXAS & LA. TO FLORIDA

**INVESTIGATION AND SUSPENSION DOCKET
NO. 6894**

COMMODITIES—PAN-ATLANTIC, FLA., LA. & TEXAS

**INVESTIGATION AND SUSPENSION DOCKET
NO. 6985**

**FROZEN CITRUS PRODUCTS—FLORIDA TO
OFFICIAL & NEW ENGLAND POINTS**

**INVESTIGATION AND SUSPENSION DOCKET
NO. 6834**

**PIGGY-BACK RATES—BETWEEN EAST AND TEXAS
NO. 32313**

**COMMODITIES—PAN-ATLANTIC—BETWEEN
EAST AND TEXAS**

FOURTH-SECTION APPLICATION NO. 34227

**TRAILER-ON-FLAT-CAR SERVICE BETWEEN OFFICIAL
TERRITORY AND DALLAS-FORT WORTH, TEX.**

**INVESTIGATION AND SUSPENSION DOCKET
NO. 6906**

**COMMODITIES VIA PAN-ATLANTIC BETWEEN TEXAS,
LOUISIANA AND FLORIDA**

**INVESTIGATION AND SUSPENSION DOCKET
NO. 6918**

BAGS AND BOXES—NEW ORLEANS, LA., TO FLA.

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-11051**

CLAY AND ROSIN—SOUTH TO EAST

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-11034**

**CANNED GOODS—FORT PIERCE, FLA., TO
BREWSTER, N. Y.**

**INVESTIGATION AND SUSPENSION DOCKET
NO. 6932**

PETROLEUM PRODUCTS—BATON ROUGE TO MIAMI

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-11264**

**VARIOUS COMMODITIES—PAN-ATLANTIC
STEAMSHIP CORP.**

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-11259**

**PAN-ATLANTIC STEAMSHIP—BETWEEN EAST,
SOUTH, AND SOUTHWEST**

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-11077**

**COMMODITIES VIA PAN-ATLANTIC—EAST
TO FLA., LA., AND TEXAS**

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-11361**

**CANNED GOODS—FORT PIERCE, FLA., TO
NEW YORK, N. Y.**

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-11375**

TIRES, CHEMICALS, AND PAINT VIA PAN-ATLANTIC

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-11387**

**COMMODITIES IN MOTOR-WATER-MOTOR SERVICE—
N. J. & PA. TO FLA. AND TEX.**

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-11465**

VARIOUS COMMODITIES—EAST TO SOUTH & SOUTHWEST

**INVESTIGATION AND SUSPENSION DOCKET
NO. 6962**

ROOFING—NEW ORLEANS TO TAMPA

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-11421**

IRON OR STEEL CASTINGS OR FORGINGS,
HOUSTON, TEX., TO BUFFALO, N. Y.

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-11436**

MACHINERY—NEW BRITAIN, CONN., TO LUBBOCK, TEX.

**INVESTIGATION AND SUSPENSION DOCKET
NO. M-11369**

ALUMINUM AND JUNK, MISS. & ALA. TO EAST

IT APPEARING, That in I. & S. No. M-10415 and embraced proceedings, on February 10, 1960, the Commission, Division 3, made and filed a report in this proceeding, 309 I. C. C. 587, and that upon petition of the railroad protestants, to which the respondents replied, the proceeding was reopened for reconsideration;

IT FURTHER APPEARING, That in I. & S. No. M-10415 and embraced proceedings, the Commission, on the date hereof, had made and filed a report on reconsideration, which report, and the report of February 10, 1960, are hereby referred to and made a part hereof;

IT FURTHER APPEARING, That by orders in the other above-entitled proceedings, except I. & S. No. 6834, and No. 32313, the Commission entered upon investigations concerning the lawfulness of the rates, charges, regulations, and practices stated in certain schedules described in said orders, and suspended the operation of the schedules for a period of seven months, said schedules now being in effect;

IT FURTHER APPEARING, That in I. & S. No. 6834, by order dated November 8, 1957, the Commission entered upon an investigation concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules described in said order, and suspended the operation of

the schedules to and including June 13, 1958, and that the respondents voluntarily postponed their effective date;

IT FURTHER APPEARING, That in No. 32313, by orders dated November 8, 1957, and December 18, 1957, the Commission, on its own motion, entered upon an investigation concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules described in said orders, said schedules being in effect and under investigation only:

AND IT FURTHER APPEARING, That a full investigation of the matters and things involved has been made, and that said division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

IT IS ORDERED, That Fourth Section Application No. 34227 be, and it is hereby, denied.

IT IS FURTHER ORDERED, That the respective respondents herein be, and they are hereby, notified and required to cancel the said schedules, to the extent found not shown to be lawful in the said report made a part hereof, on or before February 6, 1961, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under the Interstate Commerce Act, and that these proceedings be, and they are hereby, discontinued.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(SEAL)

Appendix D.

**PERTINENT PROVISIONS OF THE INTERSTATE
COMMERCE ACT****Transportation Act of 1940—Declaration of
National Transportation Policy.**

(54 Stat. 898, 899, 49 U. S. C. preceding
§§1, 301, 901 and 1001)

SECTION 1. The Act entitled "An Act to regulate commerce", approved February 4, 1887, as amended . . . is amended by inserting before Part I the following:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preference or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Sec. 15. Determination of Rates, Routes, Etc.

(7) [24 Stat. 384, 54 Stat. 911, as amended 49 U. S. C. §15(7)] Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested

carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

* * * * *

Sec. 15a as Amended 49 U. S. C. §15a*

(1) [41 Stat. 488, 48 Stat. 220, 54 Stat. 912] When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) [41 Stat. 488, 48 Stat. 220, 54 Stat. 912] In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

(3) [72 Stat. 572] In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement

* Prior to 1958, section 15a was comprised of sections (1) and (2). The only change made by the 1958 amendment was the addition of section (3) (72 Stat. 572).

of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

Sec. 305. Rates, Fares, Etc.

(c) [54 Stat. 934, 49 U. S. C. §905] It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided*, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

Sec. 307. Commission's Authority Over Rates, Etc.

(d) [54 Stat. 937, 49 U. S. C. §907] The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima

or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, ET AL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (Appendix A to the Jurisdictional Statement of the Interstate Commerce Commission)¹ is reported at 199 F. Supp. 635. The opinion of the Commission (ICC App. C) is reported at 313 ICC 23.

JURISDICTION

The judgment of the district court (ICC App. B) was entered on January 8, 1962, and notices of appeal were filed by the United States and the Interstate

¹ The Appendices to the Commission's Jurisdictional Statement will hereafter be referred to as "ICC App. A," etc.

Commerce Commission on March 9, 1962. ^{1a} This Court's jurisdiction on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by *United States v. Central Vermont Ry., Inc.*, 366 U.S. 272, and *Interstate Commerce Commission v. J-T Transport Co., Inc.*, 368 U.S. 81.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding 1, and Sections 15(7), 15a, 305(c), and 307(d) of the Interstate Commerce Act, 49 U.S.C. 15(7), 15a, 905(c), 907(d), are set forth in Appendix D to the Jurisdictional Statement of the Interstate Commerce Commission.

QUESTIONS PRESENTED

Appellee railroads proposed substantially reduced rates for trailer-on-flatcar service between certain points also served by coastal water carriers. The reduced rates, which exceeded the railroads' out-of-pocket costs in all cases and in many instances exceeded fully distributed costs, were at the level of the water carriers' rates for the same traffic, but were substantially below the level maintained by the railroads for similar traffic between points not served by the water carriers. The Interstate Commerce Commission cancelled the reductions on the ground that the water carriers could not compete with railroads at equal rates and the reductions were the final step in a general rate-cutting program which threatened the water carriers' continued existence. The questions presented are:

1. Whether, in the light of the National Transportation policy and Section 15a(3) of the Interstate Com-

^{1a} On May 8, 1962, the district court granted an extension of time for filing the jurisdictional statement to May 16, 1962.

merce Act, the Commission was barred from canceling the reduced rail rates without a finding that the water carriers, from the standpoint of overall operating, constitute a lower-cost mode of transportation than the railroads.

2. Whether, if the overall cost of water transportation is lower than that of rail transportation, the Commission would nonetheless be barred from canceling a rail rate which yields the fully-distributed cost of the particular movement when that cost is lower than the fully distributed cost of the competing water carriers for that movement.

STATEMENT

This case involves the validity of an order of the Interstate Commerce Commission directing the cancellation of substantial reductions proposed by several railroads on some 66 commodity rates for trailer-on-flatcar (TOFC) service between various points in the East, on the one hand, and Dallas and Ft. Worth, Texas, on the other. The proposed rates were limited to points served by the only deep-water common carriers now engaged in the Atlantic-Gulf coastwise trade, Sea-Land Service, Inc. (formerly Pan-Atlantic Steamship Corporation), and Seatrain Lines, Inc.

1. Sea-Land provides an Atlantic-Gulf coastwise service by motor-water-motor. Freight is moved by certificated motor carriers (or by use of Sea-Land's own motor equipment) in highway trailers over the road to the port of origin, where the trailers are lifted onto Sea-Land ships for movement via water to the destination ports. At the destination ports, the process is reversed. This service was instituted by

Sealand in 1957 when substantial increases in its operating costs as a break-bulk² water carrier led it to suspend its Atlantic-Gulf break-bulk service and convert four vessels into trailerships, each capable of holding 226 demountable truck trailers. Conversion to the more efficient trailership service has reduced Sealand's operating costs and has brought about a reduction in both cargo-handling time and in-port vessel time.

Seatrains provide Atlantic-Gulf coastwise service by rail-water-rail. Freight is transported to its dock at Edgewater, New Jersey, in railroad cars. The cars and their contents are then lifted onto Seatrain's vessels for carriage by water to Atlantic and Gulf ports. The cars then move by rail to the consignee. This service offers the shipper transportation in a single rail car from consignor to consignee.

The railroad TOFC service involved here is a motor-rail-motor operation in which a motor carrier trailer loaded by the shipper is hauled by road to a railhead, where it is loaded onto a flatcar, and demounted at destination for delivery by motor carrier to the consignee. Although this type of service has been furnished sporadically since 1926, it has grown in recent years, and the TOFC service between the points covered by this proceeding was inaugurated in the summer of 1956.

Traditionally, water rates, including water-rail and water-motor rates, have been lower than the corres-

² Break-bulk service involves the physical unloading of freight from rail-car or truck into ships at the port of origin and the reverse operation at destination.

ponding all-rail rates. Water service has also been slower, less frequent, and more perilous. When Sealand inaugurated its new trailership service in 1957, it published rates which were, in general, 5 to 7½ per cent lower than the corresponding all-rail boxcar rates, a narrower differential than that which had theretofore existed.

2. By schedules filed to become effective on November 14, 1957, and later, the railroads proposed to establish the reduced TOFC rates at issue.³ Upon the protests of the Secretary of Agriculture, Sealand, Seatrain, and other interested parties, the rates were suspended and placed under investigation. On December 19, 1960, the Commission issued its report and accompanying order.

The Commission found that the proposed TOFC rates equaled or exceeded out-of-pocket costs for all listed movements by railroad-leased TTX⁴ cars and for all but six movements by railroad-owned cars, and equaled or exceeded fully distributed costs for 43 of 66 movements by TTX cars and for 14 of 66 movements by railroad-owned cars (ICC App. C, p. 74).

³ Since the establishment of these rates would leave higher rates in effect to and from intermediate points involving shorter hauls in violation of the long-and-short-haul provisions of Section 4(1) of the Act, 49 U.S.C. 4(1), the railroads also applied to the Commission for the relief from those provisions which Section 4(1) permits the Commission to authorize "in special cases." See *A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324.

⁴ TTX cars are flatcars leased by the railroads which hold two trailers; railroad-owned cars have a capacity of one trailer per car (ICC App. C, p. 73). No finding could be made as to the relative percentages of traffic which would move under the proposed rates in either type of car (*id.* at 74).

Therefore, the Commission concluded that with the exception of the six rates returning less than out-of-pocket costs—rates which were withdrawn by the railroads and are not at issue here—the proposed rates were compensatory (*id.* at 74, 87). Similarly, the corresponding Sea-Land and Seatrain rates were, with one exception, found to be compensatory (*id.* at 72-73, 77, 87).

With respect to the relative costs of the competing modes of transportation, the Commission found that Sea-Land's costs of moving the traffic, both out-of-pocket and fully distributed, are uniformly below the railroads' costs for similar TOFC movements using railroad-owned flatcars, and are below the TOFC costs using TTX cars for all but two of the 66 movements (ICC App. C, pp. 73, 90). However, the Commission indicated that it was not resting its decision on relative costs. Because of certain variables affecting costs and the absence of rail cost data relating to some of the rates, the Commission said that it was unable to determine whether rail or water was the low-cost mode of transportation. The Commission further said: "We must recognize, also, that cost is only one of the elements which may appropriately be considered in passing upon the lawfulness of rates. In the exceptional circumstances here presented, other considerations, herein discussed, appear to us determinative of the issues" (*id.* at p. 91).

The Commission found that the perils of ocean transport, infrequency of sailings, and transit time longer than that in rail TOFC service are factors

in both Sea-Land and Seatrain service (ICC App. C, pp. 61, 63, 79-81); that, by reason of these factors, Seatrain offers a lower-quality service than TOFC (*id.* at 78-90); that there is no indication that Sea-Land has moved any traffic at rates as high as competing rail boxcar or TOFC rates (*id.* at 73, 88); that most shippers prefer railroad service to Sea-Land service unless the latter is available at lower rates (*id.* at 88); and that, in order to attract traffic, Sea-Land and Seatrain must maintain rates lower than those of the rail carriers (*ibid.*). It also found that all of Sea-Land's service is subject to rail competition; that Sea-Land must recover fully-distributed costs on its overall operations if it is to continue in operation; and that, if the lower rates which Sea-Land is competitively required to maintain are reduced to a point which fails to yield operating costs plus a reasonable return on investment, Sea-Land's operations will become unprofitable and their continuance will be jeopardized (*id.* at 89). Finally, the Commission expressly found that the "reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operations, and thus the continued existence, of the coastwise water-carrier industry generally" (*id.* at 92).

Section 15a(3) of the Interstate Commerce Act, 49 U.S.C. 15a(3), prohibits holding a carrier's rates to a particular level to protect the traffic of another mode of transportation. The Commission noted, however, that this prohibition is qualified by the words "giving

due consideration to the objectives of the national transportation policy declared in this Act" (ICC App. C, p. 91). It then pointed out (*id.* at 91-92):

It is the declared national transportation policy, among other things, to provide for fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers, all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

The Commission observed that the importance of coastwise shipping for national defense purposes has been repeatedly emphasized by various governmental agencies and that it is an integral element of the national transportation system (*id.* at 93-94). Further, the Commission reasoned that Sections 305(c) and 307(d) of the Act, 49 U.S.C. 905(c), 907(d) were indicative of a Congressional intent to accord an essential, efficiently-operated water carrier an advantage in the form of lower rates, where this was necessary to enable it to participate in the economical movement of traffic (*id.* at 95-96).

The Commission concluded (ICC App. C, p. 96):

In the circumstances presented here, we are of the opinion that the objectives of the national transportation policy require the estab-

lishment and maintenance of a differential relationship between the rates under investigation on Sea-land and Seatrain service, on the one hand, and the rates of the rail carriers, on the other, which will allow these water carriers operating in the coastwise trade to maintain rates that will enable them to continue efficient and economical coastwise service.

Although it thought the 10 per cent differential sought by Sea-Land to be excessive, the Commission stated that, in its judgment, the TOFC rates at issue should be held at 6 per cent above Sea-Land's rates so long as the latter are not increased above their present levels (*id.* at 96-97). Accordingly, the Commission found that the proposed TOFC rate reductions were not shown to be just and reasonable and directed their cancellation without prejudice to the filing of new schedules in conformity with the Commission's conclusions.

3. On February 2, 1961, the railroads filed their complaint in the district court seeking to set aside the Commission's order to the extent that it required cancellation of the proposed TOFC rates. Sea-Land and Seatrain intervened and appeared in defense of the order. On November 15, 1961, the court rendered its opinion, holding that the order requiring cancellation of the TOFC rates should be set aside and that the Commission should be enjoined from cancelling TOFC rates which return the fully-distributed costs of carriage (ICC App. A, pp. 46-47).

The court held that to require a differential between rail and water rates merely for the protection

of the water carriers would be a violation of Section 15a(3), and that the National Transportation Policy does not lead to a different conclusion (ICC App. A, pp. 31-32).⁵ At the heart of the court's decision was its conclusion that the Commission could not take steps to preserve the water carriers from the destruction which it found to be threatened unless it also found either (1) that the proposed rail rates were unduly low, viewed from the standpoint of rail costs, or (2) that those rates would deprive the water carriers of the inherent advantages which they would be entitled to maintain if they established that they were the low-cost carriers (*id.* at 34-35, 37-38). Since the Commission did find that the proposed rail rates would cover the railroads' out-of-pocket costs, there was no basis, the court held, for striking down those rates in the absence of a specific finding that water transportation was the low-cost mode from the standpoint of overall operations. The court further instructed the Commission that, even if water transportation was, overall, the low-cost mode, an individual rail rate could not be struck down if it equaled or exceeded the railroad's fully distributed costs (*id.* at 47).

THE QUESTIONS ARE SUBSTANTIAL

Section 15a(3) of the Interstate Commerce Act states that "[r]ates of a carrier shall not be held up

⁵ The court held that the national defense clause of the National Transportation Policy was merely a "hoped-for 'end,'" not an "operative policy," and that, in any event, the Commission's finding that the proposed rail rates would interfere with the national defense was not supported by the evidence (ICC App. A, pp. 43-44).

to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy * * *." The issues in this case concerning the meaning of this provision go to the heart of the continuing controversy over the proper role of government in regulating competition between different modes of transportation, in this case rail and water carriage. The decision below establishes standards for ratemaking which sharply contravene long standing policies of the Interstate Commerce Commission. Moreover, the proper interpretation of Section 15a(3) is a problem which arises in virtually every Commission proceeding concerning traffic subject to competition between different forms of transportation. See, *e.g.*, *Motion of the United States and Interstate Commerce Commission to Affirm*, p. 10, *Eastern Express, Inc. v. United States*, affirmed, 369 U.S. 37. Thus, the guidelines which emerge from this litigation will do much to shape the future transportation system of the nation.

The United States will not attempt, at this point, to elaborate its views as to the merits of the decision below. Although we actively participated in the defense of the Commission's order in the district court, we filed a supplemental brief which departed in some respects from the views held by the Commission. Since that time, the President has announced a program which is intended to remedy many of the present inadequacies in the regulation of various modes of transportation. Message from the President of the United States, H. Doc. No. 384, 87th Cong., 2d

Sess.; S. 3242, 87th Cong., 2d Sess. Problems closely related to those raised by this case are the subject of continuing study by Congress and by the Executive Branch. See, e.g., U.S. Department of Commerce, *Federal Transportation Policy and Program* (March 1960); Williams & Bluestone, *Rationale of Federal Transportation Policy* (U.S. Department of Commerce, April 1960); Special Study Group on Transportation Policies in the United States, *National Transportation Policy*, Senate Interstate and Foreign Commerce Committee, 87th Cong., 1st Sess. (Comm. Print). It suffices, we believe, at this stage of the proceedings before this Court, to state our view that the questions here presented are of substantial importance and that they fully warrant plenary consideration.

CONCLUSION

For the foregoing reasons, the United States believes that probable jurisdiction should be noted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1961

Nos. 944, 945, 946, 979
108 109, 110 125

INTERSTATE COMMERCE COMMISSION,

Appellant in No. 944,

SEA-LAND SERVICE, INC.,

Appellant in No. 945,

SEATRAN LINES, INC.,

Appellant in No. 946,

UNITED STATES OF AMERICA,

Appellant in No. 979,

v.

**THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, et al.,**

Appellees.

**On Appeal From the United States District Court of the District
of Connecticut**

MOTION TO AFFIRM

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IN THE
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—
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Nos. 944, 945, 946, 979
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INTERSTATE COMMERCE COMMISSION,

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THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, ET AL.,

Appellees.

—
ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE
DISTRICT OF CONNECTICUT
—

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph (1)(c) of the Revised Rules of this Court, the Appellee-Railroads move that the judgment of the district court be affirmed on the ground that the questions raised by the Appellants are so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

There are involved four direct appeals, one by the Interstate Commerce Commission (No. 944), one by Sea-Land Service, Inc. [Pan-Atlantic Steamship Corporation in the proceedings before the commission] (No. 945), one by Seatrain Lines, Inc. (No. 946), and one by the United States (No. 979), from a judgment of a statutory three-judge district court entered January 8, 1962.¹ In that judgment the court below set aside and vacated, in accordance with its opinion in *New York, New Haven and Hartford R. Co. v. United States*, 199 F. Supp. 635 (D. Conn. 1961),² a report and orders of the commission in a proceeding known as *Commodities—Pan-Atlantic Steamship Corporation*, 313 I. C. C. 23 (1960)³ and enjoined the commission from enforcing them "without prejudice to such further proceedings as the Commission may deem appropriate".

The opinion of the court below describes fully and adequately the rates which were before the commission for determination as to their lawfulness. As the court noted, when Sea-Land instituted its container service in 1957 between the east coast and the south and the southwest, it offered the shipping public the opportunity to move freight over water routes in containers which, when fastened to wheels, become the equivalent of the trailers used by over-the-road motor carriers. This was a new and improved type of transportation. For this new service which from a quality standpoint is in many ways equal to motor common carrier service, Sea-Land proposed a line of pricing below the railroads' boxcar rates.

1. Printed in full in Appendix B of the Commission's Jurisdictional Statement beginning at page 51 thereof.

2. Printed in full in Appendix A of the Commission's Jurisdictional Statement beginning at page 25 thereof.

3. The report of the commission is printed in full in Appendix C of the Commission's Jurisdictional Statement beginning at page 53 thereof.

The railroads were convinced that if Sea-Land's rates became effective their ability to compete by the use of conventional boxcar service would be impaired since Sea-Land would be offering to the shippers many service features at the line-haul rate which would result in additional costs if rail transportation were used. For example, the shippers using rail boxcars must, in addition to the line-haul rate, bear the cost of bracing and blocking the lading, the cost of draying the freight to a public siding if they are without a private siding, and the cost of loading and unloading the freight into and out of the cars. None of these extra expenses are incurred when Sea-Land service is used. Since the railroads believed Sea-Land was offering service superior to rail boxcar service at lower prices, they asked the commission to investigate the lawfulness of the Sea-Land rates. Some 700 of that carrier's rates were placed under investigation. With a few scattered exceptions all of these reduced Sea-Land rates are presently in effect.

The railroads, after considerable study which included surveys of their patrons, concluded that their trailer-on-flat-car service (TOFC) which, like Sea-Land service, offers the shippers transportation in highway trailers, with the only difference being that in one instance the inter-city movement of the trailers is on a ship and in the other on a flat-car, was substantially identical to Sea-Land from the service standpoint. Therefore, in an effort to meet the new form of competition, the railroads proposed, as a pilot pricing experiment, reduced TOFC rates for 66 movements⁴ on the same level as the comparable Sea-Land rates. These rates, at the request of Sea-Land, were suspended (i.e., not permitted to become effective), and placed under investigation as to their lawfulness. They are not yet in effect.

4. A movement in this instance refers to the point-to-point transportation of a specific commodity at a rate stated in cents per 100 pounds.

While the commission was considering the lawfulness of the 700 Sea-Land rates and the 66 TOFC rail rates in what amounted to a consolidated proceeding, Section 15a(3) of the Interstate Commerce Act,⁵ incorporating a new rule of rate-making for inter-mode competition, was enacted. Thus, the question before the commission was whether under this new rule of rate-making the involved rates were lawful. It was the position of the railroads that the rates of either mode which would provide revenues in excess of that mode's cost of providing service should be found lawful. The commission, as the court below noted, found that virtually all of the Sea-Land and TOFC rates were compensatory, that is, they would produce revenues in excess of the costs of furnishing service. But without regard to this finding the commission concluded that while the Sea-Land rates were lawful the TOFC rates were not (199 F. Supp. 638, 639).

The only basis used by the commission in holding the TOFC rates unlawful was, that unless Sea-Land was afforded the advantage of an artificial pricing differential in its favor, both with respect to the TOFC rates and the rail boxcar rates, it would lose traffic to the railroads thereby impairing its ability to continue in the trade (199 F. Supp. 641). To protect Sea-Land's traffic from fair price competition, the commission prescribed a 6 per cent differential in Sea-Land's favor with respect to the TOFC rates and stated that, compared with the rail boxcar rates, the differential should be "somewhat less than 6 per cent".⁶

The commission made it clear beyond all doubt that the condemnation of the rail rates was not based upon any finding that Sea-Land enjoyed an inherent advantage of lower costs than the railroads. Further, the commission stated that it could not determine whether the railroads or Sea-Land had the economic advantage of being the lower

5. 49 U. S. C. § 15a(3).

6. Commission's Jurisdictional Statement at p. 97.

cost agency since on the record Sea-Land, for some of the movements involved, appeared to have lower costs and, in others, the railroads' costs appeared to be lower.⁷ It is also noteworthy that the commission did not find that the rail rates were unlawful for any reason other than that they threatened to divert traffic from Sea-Land. For example, there was no finding that the rail rates were predatory, that they were a part of a destructive rate war, or that they were the product of an unfair destructive competitive practice, such as an effort to rig the market.

The railroads asked the court below to enjoin the commission's order on the ground that it was in violation of Section 15a(3) of the Interstate Commerce Act. That section, applicable to intermode competitive pricing, after stating the commission shall ". . . consider the facts and circumstances attending the movement of the traffic by carrier or carriers to which the rate is applicable," lays down the following prohibition:

"Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

The court below held that the commission upon its stated basis for its action was "plainly holding up railroad rates 'to protect the traffic' of another mode", and that the national transportation policy did not justify this. Therefore, the court concluded the order of the commission was unlawful and set it aside (199 F. Supp. 639, 640). The court said that Congress in enacting Section 15a(3) evidenced an intention to encourage competition between carriers of different modes, and that pricing reductions of one mode should not be held unlawful merely because they would divert traffic from another mode. This policy should

7. *Id.* at pp. 90, 91.

be followed by the commission even though the diversion would be so substantial that the continued existence of the other mode would be threatened. It is only “. . . when factors other than the normal incidents of fair competition” intervene that the reference to the national transportation policy permits rates to be pegged (199 F. Supp. 642).

The court in a fairly long *dictum* then went on and suggested that the legislative history of Section 15a(3) indicated that the commission has the power upon an appropriate record to prescribe differentials to protect the inherent low cost advantage of one mode from erosion by pricing reductions of a higher cost mode. But it should be emphasized that while the court said this could be one of the bases for condemning reduced rates certainly the court did not say that this was the only basis (199 F. Supp. 642).

Having indicated that the commission in an appropriate case could hold unlawful reduced pricing which deprives a competing mode of an inherent low cost advantage, the court said that in this instance the commission's report specifically denied that this was its basis for finding the TOFC rates unlawful (199 F. Supp. 641). Further, again by way of *dictum* the court referred to the inadequacies in the commission's report which would have created difficulties had the purpose been to protect an inherent low cost advantage (199 F. Supp. 644).

In summary, the only question before the court below for decision was whether the commission under Section 15a(3) could find unlawful the railroads' TOFC rates, and further require such rates to be pegged 6 per cent higher than the comparable Sea-Land rates, when the sole basis for its action was a finding to the effect that the railroads' parity pricing might divert substantial traffic from Sea-Land and thus might lessen its ability to continue coast-wise water operations. This, the court held, could not be

done because of the prohibition in Section 15a(3) that rates of one mode of transportation shall not be held up to any particular level to protect the traffic of another mode. The court's further exposition with respect to the power of the commission to hold unlawful reduced inter-mode competitive pricing to preserve inherent low cost advantages was *dictum* and, at most, advisory to the commission.

ARGUMENT IN SUPPORT OF THE MOTION

There is nothing to be gained by further argument and consideration of this litigation by this Court. Therefore, the judgment of the court below should be affirmed upon this Motion.

The court below—as does this Court—reviewed the commission's orders upon the basis which the commission articulated in support of them, and it was not required to search through the record and the pleadings to ascertain whether another basis, not relied upon by the commission, existed which conceivably could have supported the determination. *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, 87, 88.⁸

A reading of the commission's report, of the court's analysis of it, and of the four jurisdictional statements presented in the appeals here, compels the conclusion that the commission utilized only one basis in finding unlawful the reduced TOFC pricing. What it did was to find unlawful reduced rail pricing, which was compensatory, non-discriminatory, non-preferential, and, by the usual standards at reasonable levels, for the sole purpose of protecting the traffic of Sea-Land from diversion. This is precisely what Section 15a(3) says the commission shall not do and what the legislative history referred to by the court below indicates that Congress intended the commission should not do.⁹

The court below had no difficulty in deciding that the basis used by the commission was contrary to the statute, and it is most respectfully submitted that this Court should require no further argument to reach the same conclusion.

Congress, in the most straightforward language in Section 15a(3), directs the commission, in considering the lawfulness of inter-mode competitive pricing, not to use its

8. 199 F. Supp. 646.

9. 199 F. Supp. 642.

minimum rate powers to protect the traffic of one mode from the fair price competition of another. It is only when the price competition involves practices in conflict with the national transportation policy that the commission may intervene to curtail such practices.

The provisions of the national transportation policy relevant to inter-mode pricing require the commission “. . . to recognize and preserve . . . inherent advantages”; “. . . to promote . . . economical, and efficient service and foster sound economic conditions in transportation”; “. . . to encourage the establishment and maintenance of reasonable charges for transportation services”; and to prevent “. . . unfair or destructive competitive practices”. The outlawing of fair price competition merely because it will harm another mode of transportation by diverting traffic from it, would be contrary to all of these objectives, and especially is this so where these objectives are appraised in the light of the expressed Congressional mandate to the commission in Section 15a(3) that rates of one mode of transportation “. . . shall not be held up to a particular level to protect the traffic of any other mode” This is essentially what the court below held and any other result would have distorted both the language and the purposes of Section 15a(3), for it must be remembered that the prime objective of the Congress in enacting it was to encourage competition between the different modes.

It is noteworthy that two other three-judge statutory district courts have decided the question which was before the court below in exactly the same way. In *Missouri Pacific Railroad Co. v. United States*, 203 F. Supp. 629 (E. D. Mo. 1962) the commission, relying upon its earlier decision in the *Pan-Atlantic* case, found unlawful railroad pricing because it was at levels lower than motor carriers enjoying some of the involved traffic could profitably maintain. Again the sole basis for the commission's action was its desire to protect the motor carriers from the price com-

petition of the railroads. In holding without dissent that the commission had acted contrary to the prohibition in Section 15a(3), the court said:

"The resulting amendment was explicit in its prohibition of the 'protective' practices which the Congress attributed to the ICC during the 50's."

• • •

"Legislative history so clearly affirms the patent meaning of these words [referring to Section 15a(3)] that it does not merit quotation."

"Yet, despite this amendment and its history, the Commission would drain its strength and negate its effect entirely by grasping the qualifications of 'giving due consideration to the objectives of the national transportation policy', and emphasizing it to the detriment of the directive it merely qualifies." (203 F. Supp. 633, 634)

Another effort by the commission to interfere with fair price competition of the railroads to protect a different mode of transportation was also found unlawful by a three-judge district court without dissent in *Pennsylvania Railroad Co. v. United States*, 202 F. Supp. 584, 586 (E. D. Pa. 1962).

The carefully and thoroughly considered opinions of these two three-judge district courts, each in a different circuit, confirm the soundness of the result of the court below on the only question for decision which was before it, and support the view that there is nothing to be gained by this Court calling for a more extensive presentation of arguments on that question.

In three of the jurisdictional statements that have been submitted in the instant appeals, it is contended that this case should be argued and briefed because the opinion of the court below will have the effect of limiting the commis-

sion's power to find unlawful reducing pricing to those instances where an inherent low cost advantage is being protected. This, it is said, will reduce the commission's role to that "of a mere computer of costs".¹⁰

These contentions do not correctly characterize what the court below has done. The court, having held that the commission had not used a lawful basis for condemning the railroads' rates, quite understandably did not want to create the impression that it was holding that Section 15a(3) has totally eliminated the commission's power to find unlawful every type of reduced inter-mode competitive pricing. It therefore, in an extended *dictum*, suggested to the commission that it still retains, under some circumstances, considerable power in this field. Since the Supreme Court had held in *Schaeffer Trans. Co. v. United States*, 355 U. S. 83, that the national transportation policy requires the commission to recognize the inherent ability "of one mode to operate with a rate lower than competing types of transportation";¹¹ and, since the legislative history of Section 15a(3) indicated that the Congress was in strong agreement with this viewpoint,¹² the court below

10. Commission's Jurisdictional Statement at pp. 13-22; Sealand's Jurisdictional Statement, p. 8; and Seatrain's Jurisdictional Statement, pp. 9-13. The Jurisdictional Statement of the United States does not contain this argument.

Assuming, contrary to the fact, that the opinion of the court below propounds the proposition that the commission's power to find unlawful reduced inter-mode competitive pricing is limited solely to those instances where it is protecting an established inherent low cost advantage, this proposition would neither be controlling should the commission reopen the proceedings with respect to the instant rates, nor in other proceedings before it involving different rates. The question of whether the commission has power under Section 15a(3) of the Act to protect a low cost advantage was not before the court for decision since the commission had specifically found that it could not determine "... where the inherent advantages may lie as to any of the rates in issue" (Commission's Jurisdictional Statement at p. 91).

11. 355 U. S. 91.

12. 199 F. Supp. 642.

noted that the commission has power under the new rule of rate-making to condemn pricing that impairs or destroys an inherent advantage of low cost. While the court below, at considerable length, developed some of the problems that the utilization of such a basis might have occasioned because of the nature of the record before the commission in this instance, there is nothing in the court's detailed analysis to sustain the position that it was holding that this is the exclusive legal basis for condemning reducing pricing.

The language of the court below leading into its discussion of the commission's power to protect an inherent low cost advantage reads:

"Instead, we think, the differential-prohibition was intended to be qualified only when factors other than the normal incidents of fair competition intervened, such as a practice which would destroy a competing mode of transportation by setting rates so low as to be hurtful to the proponent as well as his competitor or so low as to deprive the competitor of the 'inherent advantage' of being the low-cost carrier." (199 F. Supp. 642).

From this language it is evident that the court was of the opinion that the reference to the national transportation policy was included to empower the commission to outlaw reduced pricing "when factors other than the normal incidents of fair competition intervene." Among such unfair destructive practices the court included pricing which would erode the inherent low cost advantage of another mode. Later in its opinion the court indicated that another type of unfair destructive competitive practice which could be brought to a halt is the full-fledged rate war which drives rates to excessively low levels (199 F. Supp. 646).

Since all of the court's discussion dealing with the bases, not present in the commission's report, which might be utilized to hold unlawful reduced pricing was *dictum* and

beyond the question before it for decision, it would seem immaterial that the *dictum* did not embrace all of the possible bases which might conceivably exist. And, what is more important from the standpoint of the instant litigation in its present posture before this Court, it would be completely unrealistic to expect this Court by a more extended *dictum* to describe every type of practice which would be proscribed because it constitutes an unfair destructive competitive practice. Rather, because of the complexity that surrounds transportation pricing, it is more realistic to expect this to be developed upon a case-to-case basis.¹³

The jurisdictional statement of the United States (No. 979), unlike the other three, does not seek full briefs and oral arguments primarily for the purpose of having this Court deal with the *dictum* of the court below. Having nothing to say “. . . as to the merits of the decision below”, its only basis for seeking a plenary review is that “. . . the President has announced a program which is intended to remedy many of the present inadequacies in the regulation of various modes of transportation”.¹⁴ Aside from the fact that this program favors “. . . greater reliance on the forces of competition and less reliance on the restraints of regulation”,¹⁵ which is an endorsement of the opinion of the court below, this Court should not be asked to consider all of the possible ramifications of the existing statute affecting inter-mode competitive rates merely be-

13. This process is already taking place. This Court has approved decisions of three-Judge Courts holding that under Section 15a(3) the Commission has power to find that unfair destructive competitive practices exist where the pricing of one mode is a predatory effort to destroy a particular competitor of another mode. See *Luckenbach Steamship Co. v. United States*, 179 F. Supp. 605, 612 (D. Del. 1959), aff. 364 U. S. 280; or where it creates by dependent agreements a monopoly as to a particular segment of traffic. See *New York Central Railroad v. United States*, 194 F. Supp. 947, 950 (S. D. N. Y. 1961), aff. *per curiam* 368 U. S. 349.

14. Jurisdictional Statement of United States at p. 11.

15. Message From the President of the United States, H. Doc. No. 384, 87th Cong., 2d Sess., at p. 3 (April 5, 1962).

cause changes in such law may come before the Congress. This Court is not the forum in which the merits of proposed legislation should be studied. The fact that the Government does not express any disagreement with the decision of the court below on the one question that was before it, lends support to the position that there is no need for this Court to receive briefs and hear arguments on that question.

In summary, the decision of the court below on the question before it, the soundness of which is confirmed by the opinions of two other three-judge district courts without dissent, should be approved by this Court. The contention of three of the appellants that this Court should receive briefs and hear oral arguments to improve the *dictum* of the court below is without merit because, in effect, this is a request that this Court come forth with a different and more extended *dictum*. The request of the Government for plenary consideration of the decision below because the Executive branch is sponsoring a program which, after being fully considered by the Congress might possibly result in the statute involved in this litigation being modified to some unknown extent, is equally without merit.

THE RELIEF REQUESTED

It is most respectfully submitted that neither the issue actually involved, nor the matters referred to by the appellants, are of such substance as to require further argument. The judgment of the court below, therefore, should be affirmed by the granting of this motion.

Respectfully submitted,

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PROOF OF SERVICE

I, Carl Helmetag, Jr., Attorney for the Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of June, 1962, I served copies of the foregoing Motion to Affirm on the several parties by mailing copies thereof in duly addressed envelopes, with postage prepaid, as follows:

1. On the Appellant, United States of America, copies to the Honorable Robert Kennedy, Attorney General of the United States, Department of Justice, Washington 25, D. C., the Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C., the Honorable Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C., and Robert C. Zampano, Esq., United States Attorney for the District of Connecticut, Federal Building, New Haven, Conn.

2. On the Appellant, Interstate Commerce Commission, copies to the Honorable Robert W. Ginnane, its General Counsel, and B. Franklin Taylor, Jr., Esq., its Associate General Counsel.

3. On the Appellant, Sea-Land Service, Inc., copies to its attorneys Warren Price, Jr., Esq., 1000 Vermont Avenue, N. W., Washington 5, D. C., Albert W. Cretella, Esq., 153 Court Street, New Haven 10, Conn., and William H. Armbrrecht, Jr., Esq., Merchants National Bank Building, Mobile, Ala. (air mail postage prepaid).

4. On the Appellant, Seatrain Lines, Inc., copies to its attorneys Ralph D. Ray, Esq. and Edmund E. Harvey, Esq., Chadbourne, Parke, Whiteside & Wolff, 25 Broadway, New York 4, N. Y., Morris Tyler, Esq., Gumbart, Corbin, Tyler

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~94~~ 109

SEA-LAND SERVICE, INC., *Appellant*,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, ET AL., *Appellees*.

On Appeal from the United States District Court for the
District of Connecticut

**BRIEF OF SEA-LAND SERVICE, INC.,
IN OPPOSITION TO MOTION TO AFFIRM**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No. 945

SEA-LAND SERVICE, INC., Appellant,

v.

**THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, ET AL., Appellees.**

**On Appeal from the United States District Court for the
District of Connecticut**

**BRIEF OF SEA-LAND SERVICE, INC.,
IN OPPOSITION TO MOTION TO AFFIRM**

Certain statements in the appellee's Statement of the Case should be commented upon. Their statements at pages 2 and 3 that the Sea-Land service, whose rates the railroads have sought to equalize, is comparable to the all-rail TOFC services, as well as the all-rail box car services, in the eyes of the shipping public is, of course, completely contrary to the findings of the Commission and receives no support in the opinion of the court below. At all events these statements

have no bearing upon the matters presented to this Court or upon the question of whether or not probable jurisdiction should be noted.

Appellees state that the "only basis" used by the Commission in holding the TOFC rates unlawful was that unless Sea-Land was allowed to publish differentially lower rates "it would lose traffic to the railroads thereby impairing its ability to continue in the trade" (p. 4) and later (p. 5) that the Commission found the rail rates unlawful for no reason other than that they threaten to divert traffic from Sea-Land. This is, to say the least, a mild characterization of the basis for the Commission decision. Actually the Commission found that a mode of transportation, the fostering of which had been held by the Commission and the Congress to be in the national interest and required by the national defense, is threatened with extinction if the railroads are permitted to wipe out the time honored rate differentials and to publish rates via their expedited, blue ribbon TOFC services on the same level as those maintained by the water carriers. There is involved not simply a question of one carrier mode losing traffic to another but a question of whether of not an entire form of domestic transportation is to survive or perish.

The appellees state further that to protect Sea-Land's traffic "from fair price competition the Commission prescribed" a 6 per cent differential in Sea-Land's favor (p. 4). The Commission did not "prescribe" a 6 per cent differential. It merely found that in the circumstances shown in connection with the particular 66 rates at issue the maintenance of rates less than 6 per cent higher than the competitive

Sea-Land rates would be competitively destructive (313 I.C.C. 47).

The appellees state (p. 4) that "the Commission made it clear beyond all doubt that the condemnation of the rail rates was not based upon any finding that Sea-Land enjoyed an inherent advantage of lower costs than the railroads"; that the Commission indicated that it could not determine on the record whether the railroads or Sea-Land had the economic advantage of being the lower cost agency. The fact is that the Commission very clearly found that with respect to the 66 TOFC rates at issue—*the only rates which are involved in the instant proceeding*—the Sea-Land service is the low cost service. (313 ICC 46, para. 2) The lower court erroneously ignored that finding. It is, of course, true that the Commission also found that "in the exceptional circumstances here presented, other considerations (than cost), herein discussed, appear to us determinative of the issues" (p. 46). But even under the application here of a "relative cost" theory the rail TOFC rates were subject to condemnation on the ground that they had been found by the Commission to apply to the higher cost mode.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND SHOULD BE RESOLVED BY THIS COURT

At issue in this proceeding, among other things, is the interpretation of the words "unfair or destructive competitive practices" as contained in the National Transportation Policy, which policy is specifically referred to in Section 15a(3) of the Interstate Commerce Act. The Commission interpreted these words in one way and the lower court in another. The appellees, while satisfied with the lower court's reversal of the Commission's order, are understandably un-

happy with its interpretation of "unfair or destructive competitive practices" and seek to shrug that interpretation off by arguing that it constitutes "an extended dictum" (p. 11). They contend that the court did not in fact fix relative cost as the sole standard to be applied by the Commission in intermodal rate controversies. While appellees' disavowal of relative cost as the necessarily controlling rate making factor is to be commended, we submit that the very vehemence with which they have relegated the lower court's findings in this area to the status of "dictum" points up clearly their own misgivings.

It is noteworthy that the appellee's views in this regard are not shared by the court in *Missouri Pacific Railroad Company v. United States*, 203 F. Supp. 629 (E. D. Mo. 1962), cited by appellees at pages 9 and 10 of their Motion. That court stated that "competition is destructive and unlawful under the *Pan-Atlantic* definition (referring to the court's decision hereinbelow) *only* when (1) rates are so low as to harm the proponent thereof or (2) so low as to deprive the competitor of his advantage of being the low cost mode." (p. 634) (emphasis added)

Thus there is a substantial difference of opinion as to whether or not the lower court's decision here does in fact virtually strip the Commission of its rate making powers in intermodal rate controversies, and relegate to it the role of "computer of costs." The very fact that this difference of opinion exists is a compelling reason why this Court should note probable jurisdiction. Unless and until the wide differences in the interpretations of Section 15a(3) are once and for all resolved there can be nothing but harmful uncertainty in the field of intermodal rate making.

CONCLUSION

Appellee's have not denied that this is a case of first impression—that it involves the first judicial interpretation of the so-called Rule of Rate Making enacted in 1958. They do not deny that this is the first time that this Court has been called upon to construe the term “unfair or destructive competitive practices” as that term is incorporated by reference in that rule. They can not reasonably deny that the future of an entire mode of transportation hangs upon the judicial determination of the question of whether or not the Interstate Commerce Commission or the lower court erred in applying this new rule of rate making.

In the circumstances we submit that the questions presented are substantial, warranting plenary consideration by this Court, and that the Motion to Affirm should be denied.

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Washington 5, D. C.
Attorney for Appellant
Sea-Land Service, Inc.

June 15, 1962

Proof of Service

I, Warren Price, Jr., attorney for Sea-Land Service, Inc., appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of June, 1962, I served copies of the foregoing Brief of Sea-Land Service, Inc. in Opposition to Motion to Affirm on the several parties hereto as follows:

1. On the United States, by mailing copies, in duly Robert C. Zampano, Esq., United States Attorney for the addressed envelopes, with first class postage prepaid, to District of Connecticut, Federal Building, New Haven, Connecticut; to Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C.; to Honorable Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C.; and to Richard H. Stern, Esq., Antitrust Division, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies, in duly addressed envelopes, with first class postage prepaid to Robert W. Ginnane, Esq., General Counsel, Interstate Commerce Commission, Washington 25, D. C.; and to B. Franklin Taylor, Jr., Esq., Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On the Appellees herein, by mailing copies in duly addressed envelopes, with first class postage prepaid to their counsel of record as follows: Eugene Hunt, Esq., and Thomas P. Hackett, Esq., 54 Meadow Street, New Haven 6, Connecticut; Carl Helmetag, Jr., Esq., 1138 Transportation Center, Six Penn Center Plaza, Philadelphia 4, Pennsylvania.

4. On the Appellant in No. 946, Seatrain Lines, Inc., by mailing copies in duly addressed envelopes with first class postage prepaid, to its counsel of record as follows: Alan S. Fuller, Esq., and Ralph D. Ray, Esq., Chadbourne, Parke,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 109

SEA-LAND SERVICE, INC., Appellant

v.

**THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY ET AL., Appellees**

**On Appeal from the United States District Court for the
District of Connecticut**

BRIEF FOR APPELLANT SEA-LAND SERVICE, INC.

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THE NEW YORK, NEW HAVEN AND HARTFORD
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On Appeal from the United States District Court for the
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BRIEF FOR APPELLANT SEA-LAND SERVICE, INC.

OPINIONS BELOW

The opinion of the district court (R. 241-262) is reported at 199 F. Supp. 635. The report of the Interstate Commerce Commission (R. 4-69) is printed at 313 I.C.C. 23.

JURISDICTION

The judgment of the three judge district court (R. 263-264) was entered on January 8, 1962. Sea-Land Service, Inc., filed its notice of appeal (R. 266-268) on March 9, 1962 and probable jurisdiction was noted on October 8, 1962. (R. 273-274) The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy (49 U.S.C. preceding sections 1, 301, 901, 1001) and sections 15(7), 15a, 305(c), and 307(d) (49 U.S.C. 15(7), 15(a), 905(c) and 907(d)) respectively, are set forth in the Appendix.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether, under Section 15a(3) of the Interstate Commerce Act and the National Transportation Policy, the Commission may find not shown to be just and reasonable, and require cancellation of, certain reduced railroad trailer-on-flatcar rates, which are compensatory (i.e. exceed the railroads' out-of-pocket costs in all instances and their fully-distributed costs in many instances) but represent substantial reductions from levels maintained elsewhere, to the same levels of the rates of the coastal water carriers and are applicable only to points served by the coastal water carriers, where the water carriers' service cannot compete at equal rates with the railroads' service and where the reduced rail rates are part of a program of rail rate reductions which threatens the continued existence of the coastal water carriers?

2. Whether, under the foregoing circumstances, the Commission may find such rail rates to be unlawful without finding as a controlling consideration that the competing water carriers are the low cost mode of transportation?

3. Whether, if the Commission must make such a finding, it must do so in terms of the "integral overall rate structure" of the competing modes of transportation?

4. Whether, if the Commission must make such a finding, it is precluded from rejecting any rail rate for a particular movement which yields the railroad's fully-distributed cost which is lower than the fully-distributed cost of the competing water carrier?

5. Whether the Court below, in reversing the Commission's decision that the rail TOFC rates at issue are not shown just and reasonable, has exceeded its statutory function and improperly substituted its judgment for that of the Commission.

STATEMENT OF THE CASE

This proceeding involves the validity of an order of the Interstate Commerce Commission (R. 70-75) directing the cancellation of 66 substantially reduced railroad freight rates applied to their TOFC, or "piggyback", service between points in the east, on the one hand, and Dallas and Fort Worth, Texas, on the other. These rates were published *only* from and to points served by the two deep water common carriers now in the Atlantic/Gulf coastwise trade, i.e. appellants Sea-Land Service, Inc. (formerly Pan-Atlantic Steamship Corporation) and Seatrain Lines, Inc. (R. 19)

1. Both Sea-Land and Seatrain have operated in the coastwise trades for many years. Until 1957, Sea-Land operated a so-called break-bulk type service, involving the physical handling of cargoes into and out of vessel holds. In order to increase efficiency, and reduce operating costs, Sea-Land in 1957 converted its operation into a "lift-on-lift-off", or trailership, operation which involves the transportation of 226 demountable highway trailers on specially designed vessels. (R. 8-9) Appellant Seatrain has operated a "containership" type service, involving the transportation on vessels of railroad cars, since the early 1930s, and also operates a "Seamobile" service, involving the transportation on its vessels of trailers. (R. 25-26)

2. In a competitive move specifically aimed at the newly instituted Sea-Land (Pan-Atlantic) trailership service the appellee railroads published the aforesaid 66 drastically reduced rates applicable to their TOFC services between eastern points and Dallas/Fort Worth, these rates being described by them as "pilot" rates. (R. 19) Inasmuch as these rates would leave higher rates in effect to and from intermediate points in violation of Section 4(1) of the Act (49 U.S.C. § 4(1)), appellees also applied for relief from the provisions of that section. (R. 19-20) On numerous protests these rates were suspended by the Commission in I & S Docket 6834 *Piggyback Rates—Between East and Texas*. On December 9, 1960, the Commission issued its report and accompanying order (313 I.C.C. 23) (R. 4-75) finding that the reduced TOFC rates at issue had not been shown to be just and reasonable, directing their cancellation without prejudice to the filing of new schedules in conformity with its conclusions, and denying the application for 4th section relief.

3. Despite the finding of the Commission that the appellee railroads were free to establish reduced rates on the considered traffic at a level 6 per cent higher than the competitive Sea-Land and Seatrain rates (R. 41-42), which level would have permitted sharing of the traffic by the railroads and the water carriers, the railroads have contested the Commission's order, primarily on the ground that it runs contrary to the provisions of section 15a(3) of the Act (49 U.S.C. 15a(3)). The appellees take the position that under that section, enacted in 1958, they are free to reduce their rates to any level that will return their out-of-pocket costs of transporting the traffic, entirely irrespective of the effect of that reduction upon the operation of competing modes of transportation, or more particularly the domestic water carriers.

THE FINDINGS OF THE COMMISSION

In its decision below holding that the reduced TOFC rates at issue have not been shown to be just and reasonable the Commission found:

1. That the reduced railroad trailer-on-flatcar rates at issue, representing substantial reductions from levels maintained elsewhere, were published solely for the purpose of establishing a basis of rates exactly equal to that maintained by the two existing coastal water carriers, Sea-Land Service, Inc. and Seatrain Service, Inc.; (R. 18-19)

2. That the reduced TOFC rates at issue apply only from and to points effectively served by the coastal water carriers and that rates to and from other points have not been reduced; (R. 19)

3. That the water carrier services although efficiently operated (R. 41) are inferior to the

rail TOFC services and that the water carriers cannot compete at equal rates with the rail TOFC services (R. 34), due to factors such as the uncertainty of ocean transport, infrequency of sailings, and longer transit time; (R. 28)

4. That the reduced TOFC rates at issue cover the railroads' out-of-pocket costs in all instances and their fully distributed costs in some instances; (R. 22)

5. That with respect to the 66 TOFC rates at issue Sea-Land is the low cost carrier, although the Commission made it clear that it was not resting its decision on "relative costs"; (R. 36-37)

6. That the maintenance of domestic coastwise shipping is in the national interest and required by the national defense; (R. 38-41)

7. That if the domestic coastwise industry is to attract traffic it must be permitted to assess rates lower than those via railroad; that the industry must maintain rates 6 per cent below the competitive rail TOFC rates in order to participate in the traffic; (R. 41-42)

8. That if Sea-Land Service, Inc. is to survive it must on an overall basis recover its full costs of operation; (R. 35)

9. That the proposed reduced railroad TOFC rates under consideration, which accord the water carriers no rate differential, are an initial step in an overall program of rate reductions that threaten the continued operation of the coastwise water carrier industry; (R. 38)

10. That the proposed reduced railroad TOFC rates are unreasonably low, and competitively destructive, to the extent that they are below a level 6 per cent higher than the present water carrier rates. (R. 41-42)

THE OPINION OF THE COURT BELOW

The Court below holds that under the provisions of Section 15a(3) of the Act the Commission may not condemn a reduced railroad rate that returns fully distributed costs unless it is found, (a) that the competing water carrier services are "in general" the low cost mode; (b) that value of service considerations demand water carrier rates on particular movements which each return to the water carriers more than their fully distributed costs and (c) that unless as to the particular movements involved the water carrier is the low cost carrier on a fully distributed cost basis. (R. 259) The court has construed Section 15a(3) as a flat prohibition against the prescription of rate differentials except where competing modes would be destroyed by rates set so low as also to harm the *proponent* of those rates, or so low as to deprive the competing mode of its inherent advantage of low costs (R. 251-252). In addition, the Court has held that in order to be entitled to protection the competing mode must be the "overall low cost mode" rather than merely the low cost mode with respect to the particular movements involved (R. 255, 256, 259).

SUMMARY OF ARGUMENT

The Court below erred (a) in holding that Section 15a(3) of the Interstate Commerce Act substantially deprives the Commission of discretion in the adjudication of intermodal rate controversies; (b) in holding

that "relative cost" is under that subsection the sole, or controlling, standard to be applied.

The legislative history of the Interstate Commerce Act manifests a clear intention by the Congress that the Act be so administered that as an end result all forms of domestic transportation will be fostered and preserved. The national transportation policy, specifically referred to in Section 15a(3), enjoins against "unfair or destructive competitive practices" by the carriers. This can only mean that in its construction of Section 15a(3) the Commission must take into account the destructive effect of rate reductions on carriers of different modes; that it must look beyond merely the effects of these reductions upon the carriers making them. This is borne out by the legislative history of Section 15a(3), including the rejection by the Congress of proposed legislation—the "three shall nots"—that would have required the Commission to ignore the intermodal competitive impact of rate reductions.

The Commission in its decision below has correctly found that the reduced rail rates at issue are a part of a selective program of rate cutting that, if unchecked, would threaten the extinction of the deep water coastal trades, contrary to the national interest. The concern for the preservation and well-being of the domestic water carrier trades, expressed in the legislative history of the Interstate Commerce Act and by Congressional committees and administrative agencies of the United States Government, was properly recognized by the Commission. In the circumstances it refused to be limited in its consideration of the lawfulness of the reduced rail rates at issue to the question of relative cost. The Court below erred in deprecating

the economic and military importance of the domestic water carriers and in failing to recognize a Congressional intent that these considerations be taken into account by the Commission in deciding the issues.

Moreover, in substituting its judgment for that of the Commission, the Court below has exceeded its statutory function and gone beyond the proper area of judicial review. Decisions with respect to the proper levels, absolute as well as relative, of carrier rates require the application of expertise which the Commission, and not the Courts, has been held to possess.

ARGUMENT

Point I. The Interstate Commerce Act does not require the Commission to adjudicate intermodal rate controversies solely, or primarily, on the basis of relative cost

The national transportation policy (49 U.S.C. preceding §§ 1, 301, 901, 1001) was added to the Interstate Commerce Act in the Transportation Act of 1940, at the same time that domestic water carriers were brought under Interstate Commerce Commission regulation. This policy has been preserved by specific incorporation in Sect. 15a(3). The policy states:

“It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to

cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.”

The purpose of the policy was to set out guide lines that would assure fair and impartial regulation of all carrier modes, so that, individually and collectively, the nation's carriers could make maximum contributions to an adequate national transportation system. The policy represents formal recognition of the fact that the regulation of individual carrier modes cannot be conducted in a vacuum; that the regulation of one mode must be accommodated to the regulation of the other modes—all to the end of developing and fostering a strong national transportation system.

Among other things the national transportation policy reaffirmed the previously expressed Congressional intent that the “law of the jungle” should not prevail in transportation; that one carrier mode should not be permitted to destroy another by “unfair or destructive” competitive practices. As the Court stated in *Eastern-Central Motor Carriers Association v. United States* 321 U.S. 194, 206 (1944), referring to the national transportation policy:

“This, while intended to secure the lowest rates consistent with adequate and efficient service and to preserve within the limits of the policy the inherent advantages of each mode of transportation,

at the same time was designed to eliminate destructive competition not only within each form but also between or among the different forms of carriage."

In *Dixie Carrier, Inc. v. United States* 351 U.S. 56, 59-60 (1956) the court stated "It was emphasized that one of the evils to be remedied (by the Act of 1940) was cut-throat competition, whereby strong rail carriers would reduce their rates, putting water carriers out of business".

Of course, the Congress has been aware of the need for the protection of carrier modes, particularly the weaker ones, from the predatory rate practices of other modes at least since 1920. To this end the Transportation Act of 1920 gave the Commission the power to fix minimum rates so as, as stated by this Court, "to keep in competitive balance the various types of carriers and to prevent ruinous rate wars between them." *New York v. United States*, 331 U.S. 284, 346. As stated in H. Report No. 456, 66 Cong., 1st Sess., p. 19, with reference to the minimum rate power proposed for inclusion in the Transportation Act of 1920:

"* * * With this power the Commission could prevent a rail carrier from reducing a rate out of proportion to the cost of service, by establishing a minimum, below which such carrier could not fix its rate. *It would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its water competitor.* Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of rates as to make it impossible for the water carrier to survive. When once competition was thus driven off the rail rates would be

restored or would rise to even higher levels. * * *"
(Emphasis added)

Section 15a(3) evolved from several years of hearings and reports on the proper purpose and scope of the regulation of intermodal rate competition. A proposal in 1955 by the President's Advisory Committee on Transport Policy and Organization, under the chairmanship of the Secretary of Commerce, recommended the elimination of the phrase "unfair or destructive competitive practices" from the national transportation policy,¹ and the enactment of a new rule of rate making, as follows:

"(3) In the exercise of its power to prescribe just and reasonable rates, the Commission shall not consider the effect of such rates on the traffic of any other mode of transportation; or the relation of such rates to the rates of any other mode of transportation; or whether such rates are lower than necessary to meet the competition of any other mode of transportation."

This proposal, known as the "three shall nots", was supported by the railroads and opposed by the water and motor carriers, as well as the Commission. This proposed amendment did not emerge from Committee nor did the rate making rule which finally emerged, and was enacted as Section 15a(3), bear any resemblance thereto. That section reads as follows:

"(3) In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determin-

¹ See *Transport Policy and Organization*, hearings before a subcommittee of the House Committee on Interstate and Foreign Commerce. 84th Cong., 1st Sess. (1955). This proposal was not adopted.

ing whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

In reporting out this new section of the Act the Senate Committee on Interstate and Foreign Commerce made it plain that although its purpose was to encourage competition in transportation, rate making was to continue to be regulated by the Interstate Commerce Commission "to prevent 'unfair or destructive competitive practices' as contemplated by the declaration of national transportation policy."²

On the House side the following colloquy occurred between Representative Harris, Chairman of the Committee on Interstate and Foreign Commerce, and Representative Thompson, in the debates on Section 15a(3):³

"Mr. Thompson of Texas. These questions are asked on behalf of the gentleman from Texas (Mr. Thomas) and myself, whom the gentleman will recognize as having water carriers in their Districts. I will say that I have no questions concerning the need and value of the bill, but the water carriers in my area have two questions they would like to have answered. I believe the gentleman has already answered them. One is that it is not intended by this bill to take away any of the inherent advantages of the coastal carriers?

² S. Rep. No. 1647, 85th Cong., 2d Sess. 3-4 (1958).

³ 104 Cong. Rec. 12,531-12,532.

"Mr. Harris. Very definitely and positively not; and the Commission must take into consideration the transportation policy of 1940.

"Mr. Thompson of Texas. That answers one of the questions they ask. The other is whether the small water carriers will be protected from so-called predatory rate reductions which are not general throughout the country.

"Mr. Harris. I would have to have a little more explanation as to what you refer to as 'little carriers' having protection from what you also refer to as 'predatory rates' in certain sections.

"We followed the new automobile case as laid down by the Interstate Commerce Commission which all carriers agree is correct, as I believe they have. Furthermore, the Supreme Court decided the very same question in an application that was before it in 1957, I believe it was.

"Mr. Thompson of Texas. I think that answers the whole question. In other words, no great carrier can come in with lower rates.

"Mr. Harris. We do not permit any carrier to engage in destructive competitive practices.

"Mr. Thompson of Texas. That answers the question and I thank the gentleman."

The appellee railroads and the Court below have interpreted Section 15a(3) as though it were identical in effect to the proposed "three shall nots". Obviously the two are far apart. The specific reference in Section 15a(3) to the "objectives of the national transportation policy"—absent in the "three shall nots"—was clearly deliberate, and responsive to insistent demands by domestic water carriers, among others. A principal objective of the national transportation policy being the prevention of destructive competitive practices, it

must follow that the Congress intended that intermodal competition that destroys be proscribed in the future, as it had been in the past.

The Commission found in the report here under consideration that the rail TOFC rates at issue were published to apply only between points served by the protestant water carriers; that they would deprive these water carriers of the ability to participate in the traffic; that they were an initial step in a program that, if unchecked, would lead to the extinction of the competing water carrier industry; that the publication of the railroad rates at issue constitutes destructive competition. The Commission in these circumstances properly heeded the injunction of the national transportation policy, as well as other relevant provisions of the act, and found the proposed rail rates unjust and unreasonable.

**The Emphasis of the Court Below in "Relative Costs"
Is Misplaced**

While we do not assert that relative costs are necessarily to be ignored by the Commission in resolving intermodal rate controversies, we do contend that they are but one factor to be considered. We submit that, as the Commission found below, factors other than cost are relevant in situations such as this where the demonstrated effect, if not purpose, of a program of rate reductions will be to destroy a competing mode—the existence of which has repeatedly been held to be in the public interest. (R. 37)

There are valid practical reasons why sole reliance upon relative costs in intermodal rate making would be contrary to the aims and purposes of the national transportation policy. Carrier "costs," as developed

by the soundest available cost finding methods, of necessity represent only approximations of the actual costs of transporting the traffic. Nor may carrier costs be presumed to be possessed of any degree of permanence or stability. Transportation costs are composed of many factors, some of the more important of which are of a constantly changing nature. The total cost of transporting particular commodities from point A to point B at a given time will depend, among other things, on the total volume of traffic moved by the involved carrier, the degree of balance in the movement, the type of equipment in use and the applicable wage scales. Any significant change in any of these factors could substantially affect the "cost" of moving the traffic. The unreliability of "costs" on still other grounds was recognized by the Commission in its report below. (R. 36)

In *Alabama R. Co. v. United States*, 340 U.S. 216 (1951) the railroads challenged an order of the Commission prescribing differentials between all-rail rates and joint rates in connection with water carriers. The Court stated:

"Appellants attack upon the ground that the order gives a competitive advantage, not justified because not supported by a finding of lesser cost of barge service, is not persuasive. Admittedly, barge service is worth less than rail service. It is slower, requires more handling and entails more risk. A shipper will pay only what the service is worth to him. The shippers' evidence, the Commission found, indicated a fairly unanimous view that the principal worth to them of shipping by barge was the saving in transportation expense which it offered. The Commission is not bound to require a rate as high for the inferior as for the superior service. To do so would certainly destroy the

principal worth of the inferior service and send all freight to the railroads; practically, there would be no competition between the different modes of transportation." * * * (223)

We observe that a similar situation would obtain in the instant proceeding. As the Commission found, the slower and less frequent service of the water carrier demands a lower rate than rail if it is to attract shipper patronage. The allowance of rail rates no higher than the water carrier rates would without question "destroy the principal worth of the inferior service and send all freight to the railroads" and "practically, there would be no competition between the different modes of transportation". The Court below apparently does not quarrel with the Commission finding that the Sea-Land service is inferior in the eyes of the shipping public to the rail TOFC services (R. 246), nor did the railroad appellees base their appeal to the Court below on the ground that the Commission had erroneously found the water service to be inferior.

This Court went on to say in the *Alabama* decision:

"Neither the Commission nor this Court has held that lesser cost of service is a finding without which the Commission may not fix a charge, division of rate, or differential.⁴ On the other hand, the con-

⁴ Both the Commission and this Court have consistently rejected any thought that costs should be the controlling factor in rate making. E. g., *New York v. United States*, 331 U.S. 284, 331; *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, 359; *Louisiana Public Service Commission v. Texas & N. O. R. Co.*, 284 U.S. 125, 132; *Charges for Protective Service to Perishable Freight*, 241 I.C.C. 503, 510-511; *Proposed Lake Erie-Ohio River Canal*, 235 I.C.C. 753, 761; *Literage Cases*, 203 I.C.C. 481, 510; *West Coast Lumbermen's Assn. v. Akron, C. & Y. R. Co.*, 183 I.C.C. 191, 198-199; *Baltimore Chamber of Commerce v. Ann Arbor R. Co.*, 159 I.C.C. 691, 696-697."

siderations just discussed were rightly taken into account by the Commission. We must not lose sight of the fact that the Commission has the interests of shippers and consumers to safeguard as well as those of the carriers. *Aryshire Corp. v. United States*, 335 U.S. 573, 592. The accommodation of the factors entering into rate structures, including competition, is a task peculiarly for the Commission. *Id.*, at 593; *United States v. Pierce Auto Lines*, 327 U.S. 515, 535-536." (223-4)

We respectfully reject the notion that the basic purposes and theory of intermodal rate regulation have been completely and drastically changed by the enactment of Section 15a(3), as the Court below holds. We submit that it was *not* the intention of the Congress to strip the Commission of its power to adjudicate intermodal rate controversies on the basis of all of the attending facts, circumstances and considerations or to relegate the Commission to the role merely of a "computer of costs".

As the Court stated in *Board of Trade v. United States*, 314 U.S. 534 (1942) at page 546:

"The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. * * *"

Under the court's ruling below the power of the Commission to evaluate the effect of rate wars, or impending rate wars, upon the adequacy and well being of the nation's transportation system, and to take appropriate actions in the premises, would be insignificant.

Thus under the lower court's decision the Commission would have been precluded, as an example, from halting a severe intermodal (truck vs rail) rate war with respect to tobacco products, which it had under consideration in 1960 in *Tobacco From North Carolina to Central Territory*, 309 I.C.C. 347. At page 361 of its decision in that proceeding the Commission said:

"Where, as here, carriers of competing modes of transportation propose reductions in their rates from levels not in excess of reasonable maximum rates for the sole purpose of attracting regulated traffic one from the other, and the only result thereof to the respondents would be a net revenue loss for all the carriers concerned, the proposals constitute a destructive rate war which this Commission is empowered to avert. Any different conclusion would serve to impair, rather than foster, sound economic conditions in transportation and among the several carriers, and lead ultimately to large-scale dissipation of carrier revenues needed to preserve and maintain a national transportation system adequate to meet the needs of commerce and the national defense."

Had the Congress in enacting the Transportation Act of 1958 intended that for the future relative cost should be the sole, or controlling, consideration in intermodal rate making, or that the carrier mode with the lowest cost should solely by virtue of that fact be allowed to prevail in any rate controversy with another mode, it would obviously have adopted the "three shall nots", or something similar thereto. But the Congress refused to adopt legislative language that would put rate-making into a vacuum and foreclose the broad view of the nation's transportation system, its inter-relationship and the need to prevent rate practices that would destroy important segments thereof. The "law

of the jungle" was unequivocally rejected. It should not be revived by a twisted and unintended interpretation of Section 15a(3) of the Act.

Point II. The Court below compounded its erroneous emphasis on "relative cost" in holding that the Interstate Commerce Commission, in the determination of which carrier mode is "low cost", must make this determination in terms of the "overall rate structure"

Not only has the Court relegated the Commission to the role of a computer of costs in resolving intermodal rate controversies but it has told the Commission that to be entitled to protection from competing rate reductions, however predatory, a given mode must be the "overall low cost mode" or "in general the low cost mode". (R. 255) Thus in any proceeding involving the reasonableness of a given competitive rate it would appear that, according to the Court below, evidence as to the cost of handling *all* traffic, by both involved modes, must be presented and ruled upon by the Commission. No party to these proceedings has contended for, or even suggested, the imposition of any such administrative burden upon the Commission, or of any such evidentiary burden upon the parties. The presentation of costs applicable to particular movements of traffic, between two particular points, is a laborious and time consuming process. The ascertainment of costs between all, or even a majority, of the points served, and with respect to the many commodities handled, by the domestic water carriers and their railroad competitors would be virtually an impossible task, staggering to contemplate, as we believe the appellees as well as the Commission will agree.

We submit that the insistence of the Court below that "overall" carrier costs be taken into account is

illustrative of the practical dangers into which the implementation of the "relative cost" theory of intermodal rate making can lead.

Point III. The Court below erred in ignoring the Congressional intent, as judicially and administratively construed, that efficient domestic water carrier service be protected from the destructive competitive rate practices of competing modes

The Commission's report below referred specifically to legislative and executive expressions dealing with the economic and defense importance of coastwise shipping. It referred to "A Review of the Coastwise and Intercoastal Shipping Trades" published by the United States Maritime Administration in 1955; to a report on domestic water carriers by the Committee on Interstate and Foreign Commerce of the Senate, entitled "1950 Merchant Marine Study and Investigation", and to its own previous report in *War Shipping Administration T A Application*, 260 I.C.C. 589, 591. (R. 38-40)⁴ A more recent expression of the vital defense importance of domestic shipping is contained in "Ocean Shipping to Support the Defenses of the United States," Department of the Navy (1961), reproduced at 107 Cong. Rec. 7299-7302 (1961).

The Commission also specifically referred to the legislative intent, as clearly expressed in the Interstate Commerce Act, that efficient water services be fostered and preserved, if necessary by the allowance of differentials under the competing rail modes to compensate for service inferiority (49 U.S.C. 905(c); 907(d);

⁴ The vital military importance of the Sea-Land trailerships was emphasized in an article "Sea Transport in Atomic War", in evidence before the Commission. (Ex. 1, App. F, Doc. 10698)

907(f); and national transportation policy). (R. 40-41)

The Court below deprecates the Commission's reliance upon the "national defense" clause of the national transportation policy, holding that this is a "hoped for" end and is not stated "as an operative policy or means." (R. 256) The Court holds that even if the national defense portion of the policy were deemed to conflict with other portions thereof "we think it not proper to disregard the more recent expressions of Congressional intent contained in Section 15a(3)." (*ibid.*) But there is clearly no conflict between the concern for the maintenance of a strong transportation system as a weapon in time of military emergency, on the one hand, and Section 15a(3) of the Act on the other. There could only be conflict if the latter were intended to remove, and has the effect of removing, virtually all restrictions in the making of competitive rates, permitting ruinous rate wars on a "survival of the fittest" basis. Can it seriously be argued that the Congress, in enacting the 1958 Act, was blind to the catastrophic results that would follow the sanctioning of uninhibited competitive rate practices among the various carrier modes?

Moreover the Court below erroneously minimized the importance of expressions by the U.S. Maritime Administration and of a Senate Committee with respect to the importance of coastal shipping to the national defense. It stated, somewhat surprisingly, that the former "stresses the need for break bulk capacity" (R. 257). It goes without saying, and need not be argued, that there is an even greater need, from the standpoint of the military, for the more mobile, more efficient trailerships than for the out-moded

break bulk vessels, which were the only types available when the Maritime Administration report was prepared.⁵

The Court below held further, with respect to the report on domestic water carriers by the Committee on Interstate and Foreign Commerce entitled "1950 Merchant Marine Study and Investigation", that the expressions indicative of the essentiality of coastal water service to the national defense were made in the past and that the report "does not seem to have resulted in legislation" (R. 257). We respectfully submit that the greatest need of the domestic Merchant Marine in the early 1950s was not new legislation but the increase of operating efficiencies through improved methods of cargo handling. These methods have since been developed, and are being employed, by Sea-Land Service, Inc. With these new and more efficient methods of operation the domestic Merchant Marine, if permitted to survive, will obviously be in a far better position than in the past to contribute to the nation's defense in time of military emergency.

With respect to the shipper evidence before the Commission indicative of a need by the general public for the service of the coastwise water carriers, the Court

⁵ As testified by Vice Admiral Ralph E. Wilson, Hearings before Merchant Marine and Fishery Sub-committee of Senate Committee on Interstate and Foreign Commerce, on the "Decline of Coastwise and Intercoastal Shipping Industries", 86 Cong. 2d Sess. (1960) pp. 105-106: "At the outset of a major, nuclear war, the domestic deep water fleet would be uniquely fitted to act as a link between our coastal cities during the period of likely disturbance of systems of land transportation. . . . The ability of the domestic deep-water fleet to provide essential coastal and intercoastal movements of priority material might well be crucial. A number of the ships of this fleet are especially adapted for rapid cargo handling, giving them an increased value at such a critical time."

below held that should the Commission "heed the statute and allow the reductions (in rail rates), the 'need' in evidence may well disappear." (R. 257) This statement reflects a total failure to understand, or to accept, the economic importance of domestic water carriers in terms of their long range role in the national transportation system. It cannot be seriously denied that once the railroads, through uninhibited rate cutting practices, have succeeded in driving what remains of the domestic deep water carriers out of business—which is unquestionably their purpose, and which undoubtedly would be their accomplishment—the selective rates by which they would have achieved this purpose will be restored to previous levels; and the shipping public and the coastal areas of the country will be forever foreclosed from accessibility to low cost water transportation. The port authority, Department of Agriculture and shipper support of the Sea-Land position before the Interstate Commerce Commission (R. 18) clearly manifests public interest in the domestic water carrier services extending far beyond an immediate concern for rates lower than those of competing modes.

Irrespective of the holding of the Court below that "the specifications of the 1958 Act" require the condonation of largely unbridled competitive rate practices by the railroads in their efforts to obtain traffic moving by the water carriers, we submit that the Congress, in rejecting the "three shall nots" and in deliberately making reference in Section 15a(3) to the national transportation policy, unmistakably indicated its continued interest in the fostering and preservation of a strong system of transportation by water, as well as by other means, and an intention that this carrier mode be protected from competitive practices that destroy.

Point IV. The Court below has exceeded its statutory function

It is axiomatic that determinations of the justness and reasonableness of carrier rates are confided to the judgment and discretion of the Interstate Commerce Commission and that its conclusions may not be disturbed in the absence of error of law or abuse of discretion. As stated by this Court in *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U.S. 541, 547-548 (1912), "it (the Court) will not consider the expediency or wisdom of the order, or whether, on like testimony it would have made a similar ruling." As stated in *United States v. Pierce Auto Lines*, 327 U.S. 515, 535-536 (1946): "It (the Court) cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." This Court has upon numerous other occasions recognized the broad discretion of the Commission in determining the justness and reasonableness of rates, as for example in *Western Chemical Co. v. United States*, 271 U.S. 268; *Virginian Ry. v. United States*, 272 U.S. 658; *Board of Trade v. United States*, 314 U.S. 534; and *Ayrshire Corporation v. United States*, 335 U.S. 573.

We respectfully submit that the opinion of the Court below is a clear-cut example of an attempt by a court to substitute its judgment for that of an administrative body in an area that has deliberately been left to the latter's expertise. The Court below has gone far beyond the function of determining whether the decision of the Commission was based upon adequate findings, supported by substantial evidence. Rather it has enunciated new theories of intermodal rate regulation.

some not contended for by any parties to these proceedings. It even takes issue with the Commission's ascertainment of, and treatment of, carrier costs—obviously an area which should be left to Commission expertise. (R. 253, 254)

The report of the Commission is detailed, reflects full and careful consideration of the evidence and the contentions of the parties, and contains the required findings. We respectfully except to the action of the Court below in substituting its judgment for that of the Commission's and in thus expanding the area of judicial review well beyond that contemplated in the statutes, and by the decisions of this Court.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

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Sea-Land Service, Inc.

January 7, 1963

APPENDIX
STATUTES INVOLVED

**National Transportation Policy [49 U.S.C., Preceding
§§ 1, 301, 901, and 1001]**

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.”

Section 15(7) [49 U.S.C., § 15]

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable

notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding had not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions prefer-

ence over all other questions pending before it and decide the same as speedily as possible.

Sec. 15a. as Amended [49 U.S.C. § 15a]

(1) [41 Stat. 488, 48 Stat. 220, 54 Stat. 912] When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) [41 Stat. 488, 48 Stat. 220, 54 Stat. 912] In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

(3) [72 Stat. 572] In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

Section 305. [49 U.S.C. § 905]

(c) [54 Stat. 934, 49 U.S.C. § 905] It shall be unlawful for any common carrier by water to make, give, or cause

any undue or unreasonable preference of advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided*, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

Sec. 307. [49 U.S.C. § 907]

(d) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

Proof of Service

I, Warren Price, Jr., attorney for Sea-Land Service, Inc., appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of January, 1963, I served copies of the foregoing Brief for Appellant Sea-Land Service, Inc. on the several parties hereto as follows:

1. On the United States, by mailing copies, in duly addressed envelopes, with first class postage prepaid, to Robert C. Zampano, Esq., United States Attorney for the District of Connecticut, Federal Building, New Haven, Connecticut; to Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C.; to Honorable Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C.; and to Richard H. Stern, Esq., Antitrust Division, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies, in duly addressed envelopes, with first class postage prepaid to Robert W. Ginnane, Esq., General Counsel, Interstate Commerce Commission, Washington 25, D. C.; and to B. Franklin Taylor, Jr., Esq., Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On the Appellees herein, by mailing copies in duly addressed envelopes, with first class postage prepaid to their counsel of record as follows: Eugene Hunt, Esq., and Thomas P. Hackett, Esq., 54 Meadow Street, New Haven 6, Connecticut; Carl Helmetag, Jr., Esq., 1138 Transportation Center, Six Penn Center Plaza, Philadelphia 4, Pennsylvania.

4. On the Appellant in No. 110, Seatrain Lines, Inc., by mailing copies in duly addressed envelopes with first class postage prepaid, to its counsel of record as follows: Alan S. Fuller, Esq., and Ralph D. Ray, Esq., Chadbourne, Parke,

Whiteside & Wolff, 25 Broadway, New York 4, N. Y.; Gumbart, Corbin, Tyler & Cooper, 205 Church Street, New Haven, Connecticut.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

INTERSTATE COMMERCE COMMISSION,

Appellant

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, *et al.*,

Appellees

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., *AMICI CURIAE*

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* Consolidated with Nos. 109, 110, and 125, *Sea-Land Service, Inc. v. N. Y., N. H. & H. R. Co.*, *Seatrail Lines, Inc. v. N. Y., N. H. & H. R. Co.*, and *U. S. v. N. Y., N. H. & H. R. Co.*

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 108*

INTERSTATE COMMERCE COMMISSION,

Appellant

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, *et al.*,

Appellees

**BRIEF OF
AMERICAN TRUCKING ASSOCIATIONS, INC., AND
NATIONAL MOTOR FREIGHT TRAFFIC
ASSOCIATION, INC., *AMICI CURIAE***

Opinion Below

The opinion of the district court (R. 241) is reported at 199 F.Supp. 635. The report of the Interstate Commerce Commission (R. 4) is printed at 313 I.C.C. 23.

Jurisdiction

This action was brought under 28 U.S.C. 1336, 1398, 2284, and 2321-2325, to set aside an order of the Inter-

* Consolidated with Nos. 109, 110, and 125, *Sea-Land Service, Inc. v. N. Y., N. H. & H. R. Co.*, *Seatrail Lines, Inc. v. N. Y., N. H. & H. R. Co.*, and *U. S. v. N. Y., N. H. & H. R. Co.* R. 273-274.

state Commerce Commission. The judgment of the three-judge district court (R. 263) was entered on January 8, 1962, and the appellants filed their notices of appeal in the district court on March 9, 1962. R. 264, 266, 268, and 271.

The jurisdiction of this Court to review the judgment of the district court on direct appeal rests on 28 U.S.C. §§1253 and 2101(b). This Court noted probable jurisdiction October 8, 1962. R. 273.

Statutes Involved

Involved are the National Transportation Policy (49 U.S.C. preceding §§1, 301, 901, and 1001), and §§15(7), 15a, 305(c), and 307(d) (49 U.S.C. 15(7), 15a, 905(c), and 907(d), respectively), printed as Appendix D to the Jurisdictional Statement of the Interstate Commerce Commission (pp. 128-132).

Questions Presented

The questions presented for review by this Court, as framed in the notices of appeal of the Interstate Commerce Commission, the United States, and appellant Sea-Land Service, Inc., (R. 265, 267, 270¹) are:

1. Whether, under Section 15a(3) of the Interstate Commerce Act and the National Transportation Policy, the Commission may find not shown to be just and reasonable, and require cancellation of, certain reduced railroad trailer-on-flatcar rates, which are compensatory (i.e., exceed the railroads' out-of-pocket costs in all instances and their fully-distributed costs in many instances) but represent substantial reductions from levels maintained elsewhere to the same levels of the rates of the coastal water carriers and are applicable only to points served

¹ The questions presented by appellant Seatrain Lines, Inc., are set forth at pp. 272-273 of the record herein.

by the coastal water carriers, where the water carriers' service cannot compete at equal rates with the railroads' service and where the reduced rail rates are part of a program of rail rate reductions which threatens the continued existence of the coastal water carriers?

2. Whether, under the foregoing circumstances, the Commission may find such rail rates to be unlawful without finding as a controlling consideration that the competing water carriers are the low cost mode of transportation?

3. Whether, if the Commission must make such a finding, it must do so in terms of the "integral overall rate structure" of the competing modes of transportation?

4. Whether, if the Commission must make such a finding, it is precluded from rejecting any rail rate for a particular movement which yields the railroad's fully-distributed cost which is lower than the fully-distributed cost of the competing water carrier?

Statement

1. *The operations of the various carriers*

In 1957, appellant Sea-Land Service, Inc. (referred to in the Interstate Commerce Commission report by its former name, Pan-Atlantic Steamship Corporation, and referred to hereafter as Sea-Land), changed its method of operation between eastern ports and Southern Atlantic and Gulf ports from a conventional break-bulk service to a "fishyback" service in which it transports demountable highway freight containers in trailerships. By converting four of its vessels into crane-equipped trailerships, it became possible for Sea-Land to provide a door-to-door, motor-water-motor, service from consignor to consignee without the necessity of intervening break-bulk operations, and achieve lower operating costs and a reduction in both cargo-handling time and in-port vessel time. R. 243.

Appellant Seatrain Lines, Inc. (hereinafter Seatrain) offers rail-water-rail service in which loaded railroad cars are placed aboard its vessels at Edgewater, New Jersey, and off-loaded at a southern coast or Gulf port for rail delivery to the consignee. This operation permits a door-to-door service only when both shipper and consignee are located on rail sidings. Seatrain contemplates a modification of this service utilizing containers capable of being transferred readily from highway trailers or flatcars to the seagoing vessel. R. 243.

To compete with these services, and particularly that of Sea-Land which is available to shippers and consignees without access to rail sidings, the appellee railroads considerably extended their "piggyback" (TOFC) highway-rail-highway service, in which highway trailers are loaded on railroad flatcars and at destination are moved by highway to the consignees' doors. R. 244.

2. The rate-making actions of the various carriers

Traditionally, water rates, including water-rail and water-motor rates, have been maintained at levels differentially lower than the corresponding all-rail rates, principally because of disadvantages in water service due to perils of the sea, slower transit time, and infrequency of sailings. R. 10-11.² On the inauguration of its trailer-ship service, Sea-Land evaluated the existing rate structures of water and overland carriers and concluded that it needed differentials under all-rail rates, but that lesser differentials would be necessary than maintained with respect to its previous break-bulk service. As a result it

² See *Class Rate Investigation, 1939*, 286 I.C.C. 5 (1952), the last major proceeding in which the rates of the Atlantic-Gulf coastwise water carriers were considered, wherein the Commission prescribed reasonable maximum first-class rates on ocean-rail traffic and percentage relations on the lower classes, designed to preserve the then existing differentials of the ocean-rail rates under the all-rail rates.

published rates generally from 5 to 7½ percent lower than the corresponding all-rail rates, but with many variations. R. 11.

By schedules filed to become effective November 14, 1957, and later, the appellee railroads proposed to establish the reduced TOFC rates here at issue. R. 17. The proposed TOFC rates, limited to 66 commodity movements from particular eastern points to Fort Worth and Dallas, Texas, and return, are on a parity with the Sea-Land rates and substantially the same as the Seatrain rates. R. 244.

3. *The decision of the Interstate Commerce Commission*

On petition of Sea-Land, Seatrain, a motor-carrier association, the Secretary of Agriculture, and several municipal authorities, the Commission placed all the TOFC rates in the initial schedule under suspension and investigation in I. & S. Docket No. 6834—"Piggy-Back Rates—Between East and Texas," which also covered the lawfulness of Sea-Land rates between the same points and certain Seatrain rates. This matter, together with three others (I. & S. Docket Nos. M-10415, 6906, and M-11375) involving the lawfulness of numerous other Sea-Land rates, was heard by an examiner who filed a separate report in each. On exceptions by the parties, No. M-10415 was heard by Division 3 of the Commission and on further exceptions by the railroads to the Division 3 report all four dockets were consolidated for hearing and dealt with in a consolidated report by the entire Commission. (313 I.C.C. 23) R. 244.

The Commission held that the proposed reduced TOFC rates were not shown to be just and reasonable and required that the proposed schedules be canceled R. 42.

The principal basis of the Commission's holding was that regardless of whether the rail or the water carriers

had the lower costs of transporting the traffic to which the rates in issue applied, or the lower cost of transportation generally, other considerations were determinative of the lawfulness of the rates, namely its findings and conclusions that there is a public need for the continued existence of the water carriers, that in order to attract traffic in competition with rail carriers the water carriers' rates must be somewhat below the rail rates, that the rail rates in issue were an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence of, the water carriers, and that, therefore, the rejection of reductions in rail rates to the same level as the rates of the competing water carriers was in furtherance of the declared national transportation policy

... to provide for fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each, to promote safe, adequate, economical, and efficient service, and foster sound economic conditions in transportation and among the several carriers, *all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail*, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. (R. 37. Emphasis the Commission's)

4. *The decision of the district court*

On February 1, 1961, the appellee railroads filed suit in the United States District Court for the District of Connecticut to set aside the Commission's report and order to the extent that they found the TOFC rates unlawful. R. 218-227. Sea-Land and Seatrain intervened and appeared in defense. R. 228-231, 235-241. On November 15, 1961, the court rendered its opinion (R. 241-259), setting aside the Commission's order requiring cancella-

tion of the TOFC rates, and enjoining the Commission from cancelling TOFC rates which return at least the fully-distributed cost of carriage. R. 258. Judgment was entered on January 8, 1962. R. 263-264.

The court held that, at least on the record before it, the requirement of a rate differential to protect the water carriers violated the 1958 amendment to the Interstate Commerce Act, now appearing as section 15a(3). R. 246-247. The disapproval of the railroad schedule was, in the court's opinion, holding up the railroad rates to protect another mode, and it stated that the evidence and findings do not support the argument that the national transportation policy compels the result achieved by the Commission. R. 247.

The foundation of the court's opinion is its interpretation of section 15a(3) as a prohibition against rate differentials:

to be qualified only when factors other than the normal incidents of fair competition intervened, such as a practice which would destroy a competing mode of transportation by setting rates so low as to be hurtful to the proponent as well as his competitor or so low as to deprive the competitor of the "inherent advantage" of being the [fully-distributed] low-cost carrier. The "inherent advantage" factor and the "destructive competitive practice" factor were the only two policy factors mentioned in the committee reports. We think the reference to the NTP in §15a(3) indicates an intent that the differential prohibition was to be qualified only when necessary because of the interplay of these two factors. R. 251-252.

The court further held that, in order to be entitled to protection against rate-cutting competition, the protected mode must be the *overall low-cost mode*, not only with respect to the particular movements in question, but beyond even the particular form of service directly involved, so that, to be entitled to such protection, the protected mode

must be shown to be the low-cost mode in general. R. 255-256. The court finally concluded that, in any event, a railroad rate for a particular movement which yields the railroad's fully-distributed cost which is lower than the water carrier's fully distributed cost, may not be disturbed. R. 259.

In the space of two short consecutive paragraphs, the court seems to establish dual and inconsistent standards respecting the Commission's power to set aside rates which return "fully-distributed costs." R. 258-259. First, it enjoined the Commission from cancellation of TOFC rates which return "at least the fully distributed cost of carriage." In the next breath, however, the court concluded that if, "on some enlarged record," the Commission should find water carriage to be the low cost mode, and also that "value of service considerations"³ demand that the water carriers receive more than fully-distributed costs on particular movements and commodities, then the Commission can require that rail rates be set above the water rates. But in the latter instance, the court adds a caveat—it withdraws from the Commission the power to cancel any rail rate in any instance where it yields the rail's fully-distributed costs and those costs are lower than those of the water carriers.

5. *The interest of the amici curiae*

The issues before this Court are of great interest to American Trucking Associations, Inc. (A.T.A.), and National Motor Freight Traffic Association, Inc. (N.M.F.T.A.). A.T.A. is the national organization of the trucking industry, representing all types of motor carriers of property. Organized and existing as a non-profit corporation under the laws of the District of Columbia,

³ Earlier in its opinion the court was highly critical of value of service considerations in rate-making. R. 252-254.

A.T.A. maintains offices at 1616 P Street, N.W., Washington, D.C. N.M.F.T.A. is a non-profit membership corporation, and, pursuant to an agreement approved under Section 5a of the Act, performs for its members through its National Classification Committee, their duties under section 216(b) of the Interstate Commerce Act, 49 U.S.C. 316(b), to establish just, reasonable and otherwise lawful classifications of property for rate-making purposes and just and reasonable regulations and practices relating thereto. N.M.F.T.A. also maintains offices at 1616 P Street, N.W., Washington, D.C. This brief, *amici curiae*, is submitted with the consent of all parties to these cases, pursuant to the provisions of Rule 42(2).

Transportation by motor vehicle over the highways is an essential part of the national transportation system which the Interstate Commerce Act and the National Transportation Policy are designed to regulate, develop, and preserve. The correct interpretation of section 15a(3) and its relationship to other parts of the Act and the National Transportation Policy is equally as vital to motor carriers as to the water and rail carriers. If relative costs are to be given a pre-eminent position in rate-making as between competing modes of transportation, the impact on the motor carriers will be just as drastic as on the intercoastal water carriers, and they will be just as subject to being drawn into relentless rate wars in which they will of necessity become early casualties. It is essential to the continued well-being of the trucking industry (as well as the entire transportation system) that the prohibition against unfair or destructive competitive practices in the national transportation policy be rescued from the stultifying limitations grafted upon it by the district court's decision.

6. The consequences of an adverse decision

The necessary consequences of an affirmance of the district court's opinion will be to drastically change the scope

of the national transportation policy as an overriding standard for the administration and enforcement of the provisions of the Interstate Commerce Act. It will place undue emphasis on costs in the regulation of intermodal rate competition, practically repealing other elements of that policy. Destructive competitive rate wars will be unchecked unless all of the costs on all services of the carriers involved are introduced into the record, placing an insurmountable burden on the Commission in its administration of the Act. If the district court decision is allowed to stand, the Commission will be barred from exercising its delegated function of developing, coordinating, and preserving a national transportation system, and will be turned into a gigantic clerical force for the computation and comparison of carrier costs.

Protests against rate reductions on the ground that they constitute destructive competitive practices will often be made impossible to carry through because of the burden placed on the protestant of proving that it is the overall low-cost carrier. The financially powerful modes of transport will be able, through selective rate cutting, to destroy their financially weaker competitors.

SUMMARY OF ARGUMENT

The basic error of the District Court is its interpretation of Section 15a(3) to mean that the comparative cost of carriage is the overriding if not sole factor to be considered in determining whether a "compensatory" rate proposed by one mode of transportation to meet the competition of another mode is below a reasonable minimum rate. This is contrary to the commands of the National Transportation Policy, which governs the Commission in the administration of all provisions of the Act, as well as contrary to Section 15a(3) itself, which requires the Commission to give "due consideration to the objectives of the national transportation policy" in determining whether a rate is "lower than a reasonable minimum rate."

The Commission, prior to the 1958 amendment to the Interstate Commerce Act, had the power to prohibit a rate reduction which constituted a destructive competitive practice, even though the rate was compensatory. This power is implicit in its power to regulate minimum rates, and was articulated as an element of Congressional policy in the national transportation policy. Rather than withdrawing this power from the Commission, the 1958 amendment to the rate-making provisions of the act specifically made that amended rate-making provision subject to the overriding considerations of the national transportation policy.

ARGUMENT

Prior To The 1958 Amendment To The Act, The Commission Had The Power To Reject Proposed Rate Reductions To Prevent Destructive Inter-Modal Competition, Even Though The Proposed Rates Were Compensatory

Prior to the amendment to §15a of the Act, the Commission had and exercised the power to reject proposed rate reductions even though the proposed reduced rates were found to be "compensatory," in that they returned something in excess of out-of-pocket costs.⁴ The standard to be applied was epitomized by the Commission (Division 3) in the *Petroleum Products From Los Angeles* report, 280 I.C.C. at 516:

However, cost, and especially out-of-pocket costs, is only one of the factors which are relevant in determining whether the proposed rates are just and reasonable. In the situation presented, where two modes of transportation are competing for the same traffic and both are necessary to meet the needs of the shippers, rates of both modes must be reasonably com-

⁴ E.g. *Pig Iron from Rockwood, Tenn., to Chicago and Joliet*, 298 I.C.C. 430 (1956); *Petroleum Products in California and Oregon*, 284 I.C.C. 287 (1952); *Petroleum Products in Illinois Territory*, 280 I.C.C. 681 (1951); *Petroleum Products From Los Angeles to Ariz. and N. Mex.* 280 I.C.C. 509 (1951).

pensatory and so related that they will not be unreasonable, unfair, or destructive, but will promote adequate, economical, and efficient service by each mode and preserve the inherent advantages of both.

In *Cantlay & Tanzola v. United States*, 15 F. Supp. 72 (S. D. Cal. 1953), the District Court annulled a Commission order approving a rate reduction for the failure of the report and order to show that the Commission considered the possible effect of the rate reduction in eliminating a competing mode of carriage. In *Pacific Inland Tariff Bureau v. United States*, 129 F. Supp. 472 (D. Ore. 1955), *motion for new trial denied*, 134 F. Supp. 210 (1955), the Court permanently enjoined the orders of the Commission approving reduced rail rates, basing its action on a failure of the evidence to show the proposed rates to be compensatory and on the Commission's failure to support its findings that the proposed rates were in harmony with the national transportation policy. In the motion for a new trial, the defendants contended that once the Commission finds that a rate proposed by a carrier is compensatory and no lower than necessary to meet competition, neither the Commission nor a court may interfere with such a rate. The Court, however, stated that in the context of the situation the Commission was required to make findings concerning the need for preserving a transportation system by water, highway and rail adequate to meet the needs of the commerce of the United States. It concluded:

Bluntly stated, we fear that the proposed railroad rates if approved will drive the barge lines out of business. This may not happen, but has the Commission considered this matter sufficiently to say that it will not happen? Contrary to the railroad's contention we believe that the Commission was required to consider this matter.⁵

⁵ 134 F. Supp. 213. Cf. *Eastern-Central M. C. Ass'n v. United States*, 321 U.S. 194 (1944).

The power to regulate minimum rates is not necessary where there is no competition. Absent the spur of competitive bidding, no carrier will price its service *too low*. Only when there are competing sellers of the goods or services do the dangers of destructively low prices come into being. The Commission recognized this relationship between competition for traffic and the power to regulate minimum rates in *Petroleum Between Washington, Oregon, Idaho, Montana*, 234 I.C.C. 609, 637 (1939):⁶

We were given power to fix minimum rates, however, primarily for the purpose of preventing destructive competition in rates and promoting the financial stability of the transportation agencies. Our duty in the exercise of that power is not done, therefore, if we allow competitive rates to gravitate to the lowest possible level. Minimum rates should be fixed, if it can be done, at levels which are consistent with some degree of carrier prosperity. . . .

The Commission's conclusion in that case that the proposed reduced rates, although compensatory,⁷ were below a reasonable minimum level, was upheld by the United States District Court⁸ for the District of Oregon in *Scandrett v. United States*, 32 F.Supp. 995 (1940), *aff'd per curiam*, 312 U.S. 661. This proceeding arose before the national transportation policy was enacted and the District Court in finding for the Commission relied upon the power granted to the Commission in the Transportation Act, 1920,⁹ to fix minimum rates, and the policy declaration therein to foster and preserve both rail and water transportation.⁹

⁶ *Accord, Drugs In Southern Territory*, 246 I.C.C. 563, 571-572 (1941).

⁷ There the Commission found that the rates in question would return something over full costs. (234 I.C.C. at 636, 639)

⁸ 41 Stat. 456.

⁹ 32 F.Supp. 997-998.

In enacting that legislation, Congress gave recognition to the relation between minimum rate regulation and carrier competition. The Committee report on the bill which became the Transportation Act, 1920, noted that the power to regulate minimum rates would not only enable the Commission to prevent a railroad from reducing a rate out of proportion to the cost of service, but:

It would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its water competitor. Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of rates as to make it impossible for the water carrier to survive. When once competition was thus driven off the rail rates would be restored or would rise to even higher levels
 ...¹⁰

Thus, at least since the Commission was given the power to regulate minimum rates by the Transportation Act, 1920, it has had the power to prohibit rate reductions which would constitute destructive competitive practices.

The Transportation Act of 1958 Did Not Withdraw From The Commission The Power To Prohibit Rate Reductions Which Constituted Destructive Competitive Practices

The Transportation Act of 1958¹¹ amended section 15a of the Interstate Commerce Act, 49 U.S.C. 15a, by adding the following paragraph:

In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall

¹⁰ House Report No. 456, 66th Cong., 1st Sess., 1919, p. 19, as quoted in *Scandrett v. United States*, *supra*, 32 F.Supp. 997-998.

¹¹ 72 Stat. 572.

consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

This amendment was the culmination of several years of reports and hearings, but the report of the Senate Committee on the bill which became the Transportation Act of 1958¹² contains only two pages of discussion on this particular provision. The House Committee report on the companion bill includes only two-and-one-half pages.¹³ The latter report (p. 2) characterizes the provision as "a new paragraph to guide the Commission in competitive rate cases." It notes that a much stronger bill was proposed by the Presidential Advisory Committee in 1955, but that administrative support for that more stringent bill was withdrawn. (p. 13) The report continues:

The committee believes that each mode of transportation should have opportunity to make rates reflecting the different inherent advantages each has to offer so that the public may exercise its choice among them, cost and service both considered, in the light of the kind of transportation [it?] desires. The committee believes, however, and the national transportation policy is clear, that such ratemaking should be regulated by the Commission to prevent unfair destructive practices on the part of any carrier or group of carriers. (pp. 13-14)

The original version of the bill which eventually became the Transportation Act of 1958¹⁴ proposed to amend section 15a by adding the following new paragraph:

¹² S. Rep. No. 1647, 85th Cong., 2d Sess., 1958.

¹³ House Report No. 1922, 85th Cong., 2d Sess., 1958. The portions of the reports dealing with the amendment of § 15a are printed in their entirety in the appendix hereto.

¹⁴ S. 3778, 85th Cong., 2d Sess. (1958), p. 7.

(3) In a proceeding involving competition with another mode of transportation, the Commission, in determining whether a rail rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by railroad and not by such other mode.

After hearing, the Senate Committee amended the language to apply to the several modes of transportation subject to the Act and added the second sentence: "Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."¹⁵ The Committee quoted language from the report of the Surface Transportation Subcommittee¹⁶ to emphasize that the amendment to section 15a was no revolutionary departure from existing law but was to serve only to "admonish the Commission to be consistent in following the policy enunciated in the Automobile case, [*New Automobiles in Interstate Commerce*, 259 I.C.C. 475 (1945)] thus assuring reasonable freedom in the making of competitive rates.

" 17

Coming then to the amendments it made in the original bill, the Senate Committee stated:

The committee wishes further to emphasize that the amendment in regard to section 5 amending section 15a of the act as framed by the committee is designed to encourage competition in transportation by allowing each form of transportation subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to offer, with such ratemaking being regulated by the Interstate Commerce Commission, however, to pre-

¹⁵ S. Rep. 1647, *supra*, n. 12, p. 2.

¹⁶ Problems of the Railroads, committee print dated April 30, 1958, included in S.Rep. 1647.

¹⁷ S. Rep. 1647, *supra*, n. 12, p. 3.

vent "unfair or destructive competitive practices" as contemplated by the declaration of national transportation policy. Under the committee amendment the principal emphasis, but not the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies.¹⁸

Thus both Committees clearly recognized the role of the national transportation policy as a guiding principle in conformity with which all of the provisions of the Act, including the newly framed amendment to the rule of rate-making, must be administered and enforced. The language of the amendment also unambiguously states that "due consideration" shall be given to the objectives of the national transportation policy in regulating intermodal competitive rates.

The language of Section 15a(3) and its legislative history does not begin to support such a major change in the transportation law as was inferred by the district court: that the amendment was intended to limit the protection against unfair or destructive competitive practices *only* to the low-cost mode. R. 250. The conclusion of the court that the reference in 15a(3) to the national transportation policy indicates an intent that the "differential prohibition" was to be qualified only when necessary because of the interplay between the "inherent advantages" factor and the "destructive competitive" factor (R. 252), seriously restricts the scope of the phrase "destructive competitive practices," and makes other vital commands in that policy mere hortatory dressing.

The district court is also placed in the position of suggesting that Congress adopted a tortuous manner of expressing an intent to make a drastic revision in the law, while off-handedly indicating the simplicity with which such intent could have been stated. We submit that in an

¹⁸ *Id.*, at pp. 3-4.

area as complex as competitive rate-making, Congress, had it intended to lay down as concrete a guide line as the court seems to find embedded in the language of § 15a(3), would have used much simpler and more direct language than that which it chose. It could have said, for example, that the Commission was prohibited from finding that any "compensatory" rate constituted a destructive competitive practice. And, if unwilling to leave to the Commission's discretion the interpretation of "compensatory," it could have supplied an exact definition. That it chose not to do this—but rather to re-emphasize the Commission's duty to give "due consideration to the objectives of the national transportation policy" in connection with its regulation of intermodal competitive rates—does not support the court's interpretation of Congressional intent in enacting § 15a(3).

In reaching its conclusion that the Commission order cancelling the TOFC rates in question could not stand, the court held that in order to be entitled to protection against rate-cutting competition, the water carriers here involved must be the *overall low-cost mode*, not only with respect to the particular movements in question, but beyond even the particular form of service directly involved. Thus, the water carriers must be shown to be the low-cost mode in general. R. 255-256. The court pointed out that there was not, and could not be, a finding by the Commission that the "*overall rate structure of Sea-Land*" was that of the overall low-cost mode, and referred specifically to the many boxcar rates as to which the railroad's costs appeared to be lower. R. 255-256. If protection against destructive competitive rate cutting can only be given to the carrier which proves that it is the low-cost carrier as to all of the movements for which it and the rate-cutting carrier compete, then a tremendous procedural burden is placed on both the protesting carrier and the Commission. The court refers to competition with different forms of service—TOFC and boxcar—of the rate-

cutting carrier. But the relationship of the costs of the competing modes can also vary, not only with different commodities but even with varying distances. Thus, the Commission has recognized that in the transportation of petroleum products in bulk, tank-truck costs are lower than those of the rail carriers below certain mileage limits while the reverse is true above those mileage limits.¹⁹

Carrying the implications of the court's reasoning to their logical conclusion, in order to win protection from destructive rate cuts, the protesting carrier must produce evidence to show that, based on its costs and the costs of the carrier proposing the rate reduction, as to all commodities, for all distances and all volumes, and as against all forms of service furnished by the rate-cutting mode, it is the overall low-cost mode. The cost of making such a case, in both time and money, is one which all but possibly the richest carriers would be unable to afford and rate reductions which are designed to monopolize particular traffic and ultimately drive competing carriers out of business would become effective by default.

The court's opinion would make mere cost computers of the Commission in cases of intermodal competitive rate-cutting. Its primary task in such cases would be to ascertain whether the aggrieved carrier was the overall low-cost mode and on that computation, and the computation whether the reduced rate covered the fully-distributed cost of the proposing carrier, would the whole decision turn. Once those computations were made the decision would be more or less automatic.

This is not the role contemplated for the Commission by a subcommittee of the Senate Committee on Interstate and Foreign Commerce, just two years after the enact-

¹⁹ E.g., *Gasoline and Fuel Oil, Friendship to Va., and W.Va.*, 299 I.C.C. 609, 619 (1957); *Petroleum, Colorado and Wyoming to W.T.L. Territory*, 289 I.C.C. 457, 466 (1953).

ment of the amendment. In its report on the "Decline of the Coastwise and Intercoastal Shipping Industry,"²⁰ the Merchant Marine and Fisheries Subcommittee characterized section 15a(3) as "an important guide, though not the sole one, in settling these rate disagreements between modes," and stated that the provision "is general in its terms—allowing flexibility for the Commission to exercise wise judgment and sensible policy both in definition and application."

The subcommittee report specifically points out that in the "rail versus water context," the phrase "meet the competition" must mean a rate that takes cognizance of a water differential and, since the differential cannot be precisely defined in dollars and cents, "the expertise and wise judgment of the Commissioners must be brought into play."²¹ And as one of its concluding comments, the subcommittee stated:

As an absolute minimum, each case that brings into question the meaning of the rule of ratemaking requires a reasoned discussion of the policies that the Commission follows with respect to section 15a(3) of the Interstate Commerce Act. The express incorporation of the national transportation policy in the rule of ratemaking is a matter of substance, requiring the Commission to examine a proposed competitive rate for destructive effect as well as destructive intent to the end that a balanced and healthy transportation system by all modes is to be preserved.²²

No such "wise judgment and sensible policy" would be permitted of the Commission under the purely mechanical functioning contemplated by the district court's decision. The court fastens on the "inherent advantage" factor and the "destructive competitive practice" factor and assumes

²⁰ Committee Print, 86th Cong., 2d Sess., 1960, p. 41.

²¹ *Id.* at 44.

²² *Id.* at 50.

that only the interplay of these two factors in a certain way will permit the Commission to require a rate differential. R. 252. This ignores the clear intent of the law that due consideration be given to "the *objectives* of the national transportation policy." Within the rigid framework erected by the district court there is no room for the exercise of judgment by the Commission. Congress cannot be presumed to have stripped such basic authority from the Commission without much clearer language than is here involved.

The Power To Prevent Destructive Competitive Rate-Cutting Is Fundamental To The Regulation Of Transportation

The district court ignored the consistent interpretation of the Act and the National Transportation Policy by the Commission and the courts prior to 1958, as well as the plain meaning of Sec. 15a(3). Thus it says that even before 1958 the Commission could not have held rates unlawful merely because they would destroy carriers of competing modes, relying on the statement in *Schaffer*²³ that "the ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of 'inherent advantage' that the congressional policy requires the Commission to recognize." R. 250. But *Schaffer* did not hold, as did the district court here, that lower cost is the only inherent advantage to be recognized, much less that it is determinative. As the Supreme Court said: "How significant these advantages are in a given factual context and what need exists for a service that can supply these advantages are considerations for the Commission."²⁴ The Court's reversal of the Commission was because it had not given the appropriate consideration.

²³ *Schaffer Transp. Co. v. United States*, 355 U.S. 83 (1957).

²⁴ *Id.*, at 90.

The district court then says that since 1958 the only portions of the National Transportation Policy that have any bearing on the lawfulness of competitive rates are those referring to "inherent advantages" (which it treats as the single advantage of low cost) and "destructive competitive practices." R. 252. Thus it says that national defense has no such bearing because it is only an "end," not an operative policy in administering the Act. R. 256. This, of course, overlooks the language of Sec. 15a (3) requiring "due consideration to the objectives," i.e., the ends of the National Transportation Policy. The court's theory is that all considerations that conflict with the exploitation of a carrier's inherent cost advantage must yield. But as was said in *Schaffer*, "the National Transportation Policy is [not] a set of self-executing principles that inevitably point the way to a clear result in each case. On the contrary, those principles overlap and may conflict, and where this occurs, resolution is the task of the agency that is expert in the field." ²⁵

The essentially dual nature of rate regulation, and especially minimum rate regulation, in transportation has long been manifest under the Interstate Commerce Act. Such regulation is necessary not only to prevent a carrier from pricing its service below cost and thereby endangering its own financial stability, but it is necessary where competition exists to prevent destructive competitive practices. This was recognized by the Committee reporting the bill which gave the Commission the power to regulate minimum rates, it is articulated in the national transportation policy, it has been recognized by the Commission as a primary purpose of its rate-regulating power, and it was acknowledged by Congress in enacting section 15a (3).

Unless this power to prevent destructive competitive rate-cutting is retained by the Commission, there is little

²⁵ *Id.*, at 92.

hope of maintaining a sound national transportation system and carrying out the objectives of the national transportation policy. The instant record gives evidence of the consequences of so severely restricting the power of the Commission to carry out the objectives of the national transportation policy. The rail rates in question are but an initial step in an overall program of rate reductions that the Commission concluded would, if unchecked, threaten the continued operations and continued existence of the water carriers. R. 38. The motor carriers affected indicated that if the reduced TOFC rates were permitted, the motor-carrier rates would also have to be reduced. R. 19. The Commission acted here to head off an incipient rate war which at best could substantially deplete the revenues and weaken the financial stability of the numerous carriers involved, and at worst could result in eliminating one or more of the carriers from the scene. This ability to act to foster sound economic conditions in transportation and among the several carriers—before rates by competitive modes are allowed to gravitate to the out-of-pocket cost level, or below—is an important factor of the national transportation policy which the district court's opinion would seriously curtail. As this Court has said:

The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.²⁶

In transportation, as in other fields, an ounce of prevention is worth a pound of cure. We submit that the Congress allowed the Commission the discretion it here

²⁶ *Board of Trade of Kansas City v. United States*, 314 U.S. 534, 546 (1942).

exercised long prior to enactment of the Transportation Act of 1958. We likewise submit that nothing in that legislation was intended to withdraw from the Commission, under proper circumstances, the right to condemn even a rate which returns full cost. Finally, we submit that such circumstances are present here, and that the opinion of the district court places the Commission in a regulatory straitjacket which does not conform to the Congressional pattern.

Conclusion

For the reasons stated, American Trucking Associations, Inc., and National Motor Freight Traffic Association, Inc., *amici curiae*, pray that this Court will reverse the decision of the District Court and reinstate the decision of the Interstate Commerce Commission.

Respectfully submitted,

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APPENDIX

[From S.Rep. No. 1647, 85th Cong., 2d Sess., 1958, pp. 2-4]

III. DISCUSSION OF CHANGES IN THE SUBCOMMITTEE
REPORT MADE BY THE FULL COMMITTEE

Changes were made, as follows, in three of the recommendations contained in the subcommittee report:

(1) *Subcommittee recommendation No. 3, "Competitive Ratemaking"*

Upon consideration of the amendment recommended by the subcommittee to section 15a of the Interstate Commerce Act, designated the rule of ratemaking, the full committee agreed to further hearings on this recommendation, which were held May 20-21, 1958.

Representatives of all interested modes of transportation, railway labor, shippers, and the Interstate Commerce Commission were present and offered testimony at the hearing. Upon further consideration, the committee, in the light of this testimony, concluded that an amendment to the rule of ratemaking should apply to the several modes of transportation subject to parts I, II, III, and IV of the Interstate Commerce Act and should be constituted as a new subparagraph (3) to section 15a of the act to read as follows:

In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

In making this amendment to section 5 of S. 3778, the committee agrees with and wishes to emphasize the import of the following excerpt from the subcommittee report:

The subject of competitive ratemaking as between the different forms of transportation was discussed at length during the hearings, the railroads urging enactment of legislation that would restrict substantially the authority of the Interstate Commerce Commission in this field. The subcommittee is not convinced that the record before it justifies approval of the railroads' proposal.

It is the policy of this subcommittee, and it is believed to be the policy of the Congress, that each form of transportation should have opportunity to make rates reflecting the different inherent advantages each has to offer so that in every case the public may exercise its choice, cost and service both considered, in the light of the particular transportation task to be performed. The subcommittee believes and the national transportation policy is clear, however, that such ratemaking should be regulated by the Commission to prevent unfair destructive practices on the part of a carrier or group of carriers.

It nevertheless appears that the Interstate Commerce Commission has not been consistent in the past in allowing one or another of the several modes of transportation to assert their inherent advantages in the making of rates. The subcommittee recommends, therefore, that the Commission consistently follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of service or of cost. In 1945 in *New Automobiles in Interstate Commerce* (259 ICC 475), the subcommittee believes that the Commission properly construed the intent of Congress in this respect when it said:

"As Congress enacted separately stated rate-making rules for each transport agency, it obviously intended that the rates of each such agency should be determined by us in each case according to the facts and circumstances attending the movement of the

traffic by that agency. In other words, there appears no warrant for believing that rail rates, for example, should be held up to a particular level to preserve a motor-rate structure, or vice versa (259 ICC at p. 538)."

The subcommittee wishes to affirm the interpretation of the Commission given in the Automobile case epitomized in the words quoted above. The subcommittee therefore believes it necessary to amend the act only so as, in effect, to admonish the Commission to be consistent in following the policy enunciated in the Automobile case thus assuring reasonable freedom in the making of competitive rates. * * *

The subcommittee anticipates that the broad effect of this amendment will be to encourage competition between the different modes of transportation to the benefit of the shipping public. * * *

The subcommittee further notes that the Supreme Court in *Schaeffer Transportation Co. et al. v. U. S.* (No. 20, October term, decided December 9, 1957), —U. S. —, 78 S. Ct. 173, 178, in reversing the Interstate Commerce Commission for denying a motor carrier application because rail service was "reasonably adequate," said: "To reject a motor carrier's application on the bare conclusion that existing rail service can move the available traffic, without regard to the inherent advantages of the proposed service, would give one mode of transportation unwarranted protection from competition from others."

The purpose of this amendment is to produce consistency in the interpretation of the national transportation policy.

The committee wishes further to emphasize that the amendment in regard to section 5 amending section 15a of the act as framed by the committee is designed to encourage competition in transportation by allowing each form of transportation, subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to offer, with such rate-making being regulated by the Interstate Commerce Com-

mission, however, to prevent "unfair or destructive competitive practices" as contemplated by the declaration of national transportation policy. Under the committee amendment the principal emphasis, but not the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies.

* * * *

[From H.Rep. No. 1922, 85th Cong., 2d Sess., 1958,
pp. 13-15]

COMPETITIVE RATEMAKING

(Sec. 5, adding a new par. (3) to sec. 15a of the act)

In the past few years probably no subject has been given any more extensive hearings or attention by the committee than that of competitive ratemaking as between the different modes of transportation.

The dominant objective of the changes in transportation policy proposed by the Presidential Advisory Committee in 1955 and of the implementing legislation (H. R. 6141 and H. R. 6142) was a proposed change in the "rule of ratemaking" (contained in sec. 15a of the Interstate Commerce Act) to place "increased reliance on competitive forces of transportation in ratemaking" and restrict the Commission's jurisdiction over competitive rates. As Secretary Weeks observed to the committee:

It was believed that carrier self-interest tempered by the dictates of competitive enterprise is capable of producing a sounder rate structure than that which can be imposed by a regulatory agency.

During April, May, and June of 1956, in the hearings on these legislative proposals, the railroads vigorously supported the Advisory Committee recommendations, and the motor and water carriers as vigorously opposed them.

The essence of these recommendations subsequently was contained in H. R. 5523 and H. R. 5524, known as the "three-shall-not rule" because it declared that in determining what is less than a reasonable minimum rate, the Commission: (1) shall not consider the effect of the rate on the traffic of other carriers; (2) shall not consider the relation of the rate to the rate of any other carrier; and (3) shall not consider whether the rate is lower than necessary to meet the competition of other carriers. These bills were heard at length in the spring of 1957, with the same contention among the witnesses representing the various modes of transportation.

Further hearings on the subject of competitive ratemaking were held in April and May of this year, at which time Secretary Weeks expressed the view that "We have reconsidered the 'three-shall-not' rule and feel that it goes too far," and made an inchoate suggestion that while there should be greater competition among carriers in ratemaking, unfair or destructive competition should be prevented by some sort of rule of reason similar to that employed in the Sherman Act. In both the earlier and revised recommendations, the Secretary's references to stimulation of competition encompass both competition between carriers of the same mode of transportation and competition among different modes of transportation.

In these recent hearings, the railroads again advocated substantial modification of the rule of ratemaking and the motor and water carriers urged that it be retained as it is now written in the statute.

The committee believes that each mode of transportation should have opportunity to make rates reflecting the different inherent advantages each has to offer so that the public may exercise its choice among them, cost and service both considered, in the light of the kind of transportation desires. The committee believes, however, and the national transportation policy is clear, that such rate-

making should be regulated by the Commission to prevent unfair destructive practices on the part of any carrier or group of carriers.

It nevertheless appears that the Interstate Commerce Commission has not been consistent in the past in allowing one or another of the several modes of transportation to assert their inherent advantages in the making of rates. In 1945 in *New Automobiles in Interstate Commerce* (259 I. C. C. 475), the Commission said:

As Congress enacted separately stated ratemaking rules for each transport agency, it obviously intended that the rates of each such agency should be determined by us in each case according to the facts and circumstances attending the movement of the traffic by that agency. In other words, there appears no warrant for believing that rail rates, for example, should be held up to a particular level to preserve, a motor-rate structure, or vice versa (259 I. C. C. at p. 538).

In *A. W. Schaffer Extension—Granite* (63 M. C. C. 247), the Interstate Commerce Commission denied an application by a common carrier by motor vehicle for authority to transport granite between various points which were being served exclusively by rail. The Commission based its denial of the application on the ground that the rail service was "reasonably adequate," that the main purpose of the witnesses who supported the application was to obtain lower rates rather than improved service and that this was not a proper basis for a grant of authority. The Supreme Court in *Schaeffer Transportation Co. et al v. U. S.* (355 U. S. 83 (1957)), reversed the Commission, and in its opinion said—

To reject a motor carrier's application on the bare conclusion that existing rail service can move the available traffic, without regard to the inherent advantages of the proposed service, would give one mode of transportation unwarranted protection from competition from others.

Later in the opinion it said:

The ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of "inherent advantage" that the congressional policy requires the Commission to recognize.

The committee believes that the Commission consistently should follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of cost or service, giving due consideration to the objectives of the national transportation policy declared in the Interstate Commerce Act. The objectives of this policy of the Congress are:

to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

The committee feels, accordingly, that an amendment to the rule of ratemaking is desirable to serve as a guide to the Commission in achieving consistency in its treatment of competitive rate cases. The bill being reported proposes a new paragraph (3) to section 15a, applicable to all of the modes of transportation subject to parts I, II, III, and IV of the act, reading as follows:

In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

The committee is of the opinion that the effect of this amendment will be to encourage competition between the different modes of transportation for the benefit of the shipping public. It understands that the amendment, while not having the full endorsement of all of the modes of transportation, at least is not unacceptable to any of them.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

Nos. 108-110, 125

INTERSTATE COMMERCE COMMISSION,
Appellant in No. 108
SEA-LAND SERVICE, INC., *Appellant in No. 109*
SEATRAN LINES, INC., *Appellant in No. 110*
UNITED STATES OF AMERICA, *Appellant in No. 125*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, et al., *Appellees.*

On Appeal from the United States District Court
for the District of Connecticut

**BRIEF OF THE WATERWAYS FREIGHT
BUREAU AS AMICUS CURIAE**

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RAILROAD COMPANY, et al., *Appellees.*

On Appeal from the United States District Court
for the District of Connecticut

**BRIEF OF THE WATERWAYS FREIGHT
BUREAU AS AMICUS CURIAE**

STATEMENT OF INTEREST

The Waterways Freight Bureau is an organization of common carriers by water holding certificates from the Interstate Commerce Commission and operating on the Mississippi and Ohio rivers and connecting and tributary waterways. The Bureau engages in joint

consideration of traffic matters, including rates and charges of its members, pursuant to an agreement approved by the Commission under Section 5a of the Interstate Commerce Act. *Waterways Freight Bureau—Agreement*, 277 I.C.C. 593 (1950), as amended. The Bureau also participates on behalf of its members in proceedings before the Interstate Commerce Commission and before the Courts involving the lawfulness of rates under the standards of the Interstate Commerce Act. Written consent for the filing of this brief *amicus curiae* has been obtained from counsel for all parties of record.

The interests of the members of, and the inland water carrier industry represented by, the Waterways Freight Bureau in the instant case are vital and far-reaching. Like the coastwise water carrier industry, whose very existence turns on the Court's decision in this case, the future of the inland water carrier industry is inextricably involved in the regulation of rail-water competition. The decision of the court below has been followed by at least one other court in overturning a Commission decision involving rail-inland water carrier competition. See *Pennsylvania Railroad Co., et al. v. United States, et al.*, 202 F. Supp. 584 (E.D. Pa. 1962). It is vitally important to the growth and economic stability of the inland water carriers that the issues of law before the Court be resolved definitively and conclusively.

SUMMARY

Section 15a(3), added to the Interstate Commerce Act in 1958, prohibits the Interstate Commerce Commission from holding up the rates of one mode of transportation to protect the traffic of another mode,

"giving due consideration to the objectives of the national transportation policy declared in . . . [the] Act." National Transportation Policy and Section 15(a), Interstate Commerce Act, 49 U.S.C. preceding sections 1, 301, 901 and 1001, and section 15a(3). The Congressional intent was to encourage fair and constructive competition by permitting each mode greater freedom in asserting its inherent advantages of cost or service. Congressional intent is equally clear that the section was not intended to curb or impair the Commission's power to prevent destructive competition. S. Rep. No. 1647, 85th Cong., 2d Sess., 3-4 (1958).

Section 15a(3) must be interpreted to further the objectives of the National Transportation Policy. The prohibition in that section applies only where it furthers the assertion of inherent advantages and not where such prohibition would operate solely in derogation of other objectives of the Policy. *A fortiori*, the Commission may prevent destructive competition, where rate-making is not shown to involve the assertion of inherent advantages of cost or service.

Destruction of one carrier industry by another constitutes destructive competition, which the Commission must prevent, in the absence of proven inherent advantages justifying such destruction. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

Fully-distributed cost, determined in the manner prescribed by the Commission, is the criterion for determining inherent advantages of cost.

One mode of transport which is the higher cost mode on a particular type of service may not, by cutting

rates on that type of service, deprive another mode of its inherent advantage of cost vis-a-vis that service.

Where one mode of transport has an inherent advantage in cost or service, the Commission has power to protect the traffic of that carrier at rate levels above its fully-distributed cost.

ARGUMENT

I. THE NEW RULE OF RATEMAKING AND THE NATIONAL TRANSPORTATION POLICY

The instant case involves an extremely important problem in statutory interpretation. Basically, it involves the reconciliation of the text and purpose of an amended rule of inter-modal competitive ratemaking with a coordinated system of regulation for all modes of transportation. The problem is one of *harmonizing* purposes which are apparently in conflict. The solution does not lie in wholesale displacement and repeal of existing standards by the new amendment. Careful analysis of the new amendment shows that such a result was not intended by Congress. Instead, it is quite clear that the new rule of ratemaking is consistent with, and by no means in derogation of, existing policy standards.

The case at bar poses the direct issue of the relationship between the provisions of the National Transportation Policy¹ and the new rule of ratemaking in Section 15a(3) of the Interstate Commerce Act.² The

¹ National Transportation Policy, Transportation Act of 1940, 54 Stat. 899, c. 722, 49 U.S.C., preceding sections 1, 301, 901 and 1001.

² Transportation Act of 1958, 72 Stat. 572, 49 U.S.C. sec. 15a(3).

instant proceeding involves regulation of the rates of competing modes of transportation. The railroads reduced their rates on TOFC (trailer-on-flat-car) service to parity with the rates of competing coastwise water carriers. (R. 35) The Interstate Commerce Commission found that the coastwise carriers could not attract traffic under such a rate relationship (R. 34). Considering relative costs and value of service to the shipper of rail and water service, the Commission was unable to conclude whether either type of carrier possessed an inherent advantage of cost or service. (R. 36-37). That agency did conclude, however, that the rail rate reductions would precipitate further cycles of rate cutting which would not stop even after reaching a destructive level. (R. 29). Finally, and most important, the Commission concluded that the rail rate reductions were an initial step in a program of rate reductions which threatened the continued existence of the coastwise water-carrier industry generally. (R. 38). The Commission found that under these circumstances, the Interstate Commerce Act required holding up rail TOFC rates to a level above water carrier rates. The district court reversed the Commission, holding that the Commission could not prevent the railroads from reducing their rates unless this was necessary to protect an inherent advantage of the water carriers. The basic issue now before the Court is whether, under the circumstances described, the Commission's requirement of a rail rate level above that of the water carriers violates the new rule of ratemaking in Section 15a(3), interpreted in the light of the National Transportation Policy.

The problem now before the Court had its genesis in the extension of the Interstate Commerce Commis-

sion's regulatory power to encompass competing *modes* of transportation. Regulation of diverse types of carriers—railroads, motor carriers and water carriers—presented entirely new regulatory problems. New standards of regulation were called for. The National Transportation Policy was Congress's response to that need.

It is significant that the first formulation of that policy was contemporaneous with the extension of the Commission's jurisdiction to include, for the first time, two competing modes of transport—railroads and motor carriers.³ When the Transportation Act of 1940 extended regulation to water carriers, the National Transportation Policy was enacted to guide the Commission in regulating carriers of varying characteristics and advantages—railroads, water carriers and motor carriers.⁴

The legislative history of the policy clearly reveals that one of the primary purposes of that policy was to require the Commission to preserve the "inherent advantages" of water transportation. See separate opinion of Mr. Justice Black, dissenting, in *Interstate Commerce Commission v. Inland Waterways Corp.*, 319 U.S. 671 (1943), at pages 697-703, which contains an extended discussion of this legislative history. There were repeated assurances by the sponsors of this legislation that these inherent advantages would be preserved.⁵ The Waterways Freight Bureau strongly en-

³ Motor Carrier Act of 1935, 49 Stat. 543, c. 489, as amended 54 Stat. 919 (1940).

⁴ 49 U.S.C. preceding sections 1, 301, 901 and 1001.

⁵ See also S. Chesterfield Oppenheim, "The National Transportation Policy and Inter-Carrier Competitive Rates" (1945), at pages 4-15.

dorses freedom to assert inherent advantages of cost or service in "fair and constructive" competition. But the fact that competition in transportation has destructive tendencies places the instant proceeding, where such tendencies have become manifest, outside the realm of healthy competition.

In the National Transportation Policy, Congress enumerated several criteria to shape the Commission's regulation of competing modes. There is to be "fair and impartial regulation of all modes of transportation . . . so administered as to recognize and preserve the inherent advantages of each."⁶ The Commission is "to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers." Insofar as ratemaking is concerned, the Commission is to encourage reasonable charges without "unfair or destructive competitive practices." All these criteria are directed "to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."⁷

What Congress sought to achieve in enacting this policy is of crucial importance to the instant proceeding. The change in the character of Commission regulation was clearly stated in *Eastern-Central Motor Carriers Asso. v. United States*, 321 U.S. 194 (1944), at pages 205-207:

"But with the evolution of other forms of carriage, particularly motor carriage, and the Com-

⁶ National Transportation Policy, *supra*.

⁷ National Transportation Policy, *supra*.

mission's acquisition of control over their rates and operations, a new situation arose. The Commission's task no longer was merely the regulation of a single form of transport, to secure reasonable and nondiscriminatory rates and service. It became, not merely the regulator, but to some extent the coordinator of different modes of transportation. With the addition of motor and water carriage to its previous jurisdiction over rails, it was charged not only with seeing that the rates and services of each are reasonable and not unduly discriminatory, but that they are coordinated in accordance with the national transportation policy, as declared by the later legislation. This, while intended to secure the lowest rates consistent with adequate and efficient service and to preserve within the limits of the policy the inherent advantages of each mode of transportation, at the same time was designed to eliminate destructive competition not only within each form but also between or among the different forms of carriage.

"Necessarily the impact of these changes brought problems the Commission previously had not faced. Necessarily too the Commission in facing them, including those of adjustment among the various forms of transportation, called upon its previous experience in the railroad field for guidance to its judgment. But that experience could not apply fully to the other and different forms of carriage. Nor could it do so always when the interests of two or more were found in conflict. Each form of transportation presents, by reason of its peculiar operating conditions, its own problems for the function of rate making. And each, by virtue of competition with others, presents additional complications arising from the varied circumstances of their operation. Hence, in such situations, principles previously established for application within a single form of transportation cannot always be transplanted to

control its relations with another or those of both with the public generally, without consequences unduly harmful to one or to the public interest."

Under the National Transportation Policy, the Commission was, therefore, given a new and *affirmative* duty—to regulate so as to achieve a *coordinated* system of various modes of transportation. Insofar as the regulation of intermodal competition is concerned, the prohibition against "destructive competitive practices" and the fostering of "sound economic conditions in transportation and among the several carriers" definitely excluded a passive role for the Commission, in which they were to be heedless of the results competition might produce.

Any question as to the weight to be accorded the National Transportation Policy was eliminated by the Whittington Amendment, which added the following language to the policy (84 Cong. Rec. 9861):

"All the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 49 U.S.C. preceding sections 1, 301, 901 and 1001.

Far from being a technical preamble, the policy was instead a direct guide for interpreting and applying the specific provisions of the Act.

It was in this statutory context that Section 15a(3) was added to the Interstate Commerce Act in 1958.*

*Transportation Act of 1958, 72 Stat. 572, 49 U.S.C. Sec. 15a(3). This section reads as follows:

"(3) In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circum-

The last sentence of that section clearly indicates that, like all other provisions in the Act, this section is subordinate to, and must be interpreted in the light of, the National Transportation Policy:

“Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.” (Emphasis supplied.)

The legislative history of Section 15a(3) clearly shows that it was not intended to alter the National Transportation Policy.⁹ Clearly, Congress emphasized that the new section was to be utilized in effectuating policy objectives, and not in derogation of them.¹⁰

stances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.”

⁹ At 104 Cong. Rec. 12532, Cong. Fulton queried: “So that it would simply be that this legislation is a guide to the Commission, not an alteration of the basic transportation policy; is that true?” Cong. Harris (one of the legislation’s sponsors): “That is true.”

¹⁰ Sen. Potter left little doubt that the very intent of the new section was to secure consistency with the National Transportation Policy:

“I believe it was on my suggestion that the full committee included in the bill language to correspond with the objectives of a national transportation policy. Under that policy, every mode of transportation is included.

“Representatives of each mode of transportation testified before the committee that they would be perfectly happy to have their rate sections considered according to the national transportation policy. So in determining a rate, whether it be the rate for trucks, barge lines, or railroads, we stated that it had to be consistent with the national transportation policy.”
104 Cong. Rec. 10860.

It is equally clear that Section 15a(3) was not intended to relegate the Commission to the role of a passive observer of the destructive effects that unrestrained competition might produce. Bills were introduced incorporating the "three-shall-not rule," which declared "that in determining what is less than a reasonable rate, the Commission: (1) shall not consider the effect of the rate on the traffic of other carriers; (2) shall not consider the relation of the rate to the rate of any other carrier; and (3) shall not consider whether the rate is lower than necessary to meet the competition of other carriers." H.R. Rep. No. 1922, 85th Cong., 2d Sess. (1958), at page 13. The possibility of "destructive competition" led to rejection of this rule. H.R. Rep. No. 1922, *supra*, at pages 13-14. Clearly, Congress did not intend that the Commission be powerless to deal with unrestrained competition, regardless of its destructive effect upon competing modes.

On the other hand, there was a purpose in enacting the new rule of ratemaking. That purpose is entirely consistent with the National Transportation Policy. Indeed, the purpose of the amendment is phrased in terms of one of the policy's objectives. This purpose was clearly stated many times in the legislative history of Section 15a(3), e.g., in H.R. Rep. No. 1922, 85th Cong., 2d Sess. (1958), at page 14:

"The committee believes that the Commission consistently should follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of cost or service, giving due consideration to the objectives of the national transportation policy declared in the Interstate Commerce Act." See also S. Rep. No. 1647, 85th Cong., 2d Sess. (1958) at page 3.

From this background of legislative history, several principles are clear. Congress intended that there be increased competition in transportation where such competition results from the assertion of inherent advantages in cost or service. To this end, the Commission may not hold up the rates of a carrier to a particular level to protect the traffic of any other mode. But the rule is not unqualified. The legislative history of the section is clear that it is not to be considered a license for destructive competition. The section also must be interpreted so as to *advance* the objectives of the National Transportation Policy.

It is possible to reconcile the new rule of ratemaking with the prohibition against destructive competition and with policy objectives without, as the court below has done, using the principle of inherent advantages to devour other statutory criteria, and in particular, the prohibition against "destructive competitive practices."

The prohibition against destructive competition clearly implies a restraint upon competition under certain conditions. The legislative history of Section 15a(3) clearly reveals an intent to promote only "fair and constructive" competition.¹¹ On the other hand,

¹¹ Senator Bricker, who was active in drafting the Transportation Act of 1958, incorporated the following in his remarks concerning the new rule of ratemaking: "The whole purpose [of section 5, S. 3778] is to say in fairly clear terms that each form of transportation shall have full opportunity to make such rates as reflect its own inherent advantages so that the public may in every case have the ability and the opportunity to exercise its choice of the form of transportation to be used, cost and service considered, in the light of the transportation task to be performed. This will encourage fair and constructive competition. I emphasize the words 'fair and constructive' because by the language in section 5 of

destructive competition clearly exists in the elimination of competition through the exertion of advantages not stemming from superior efficiency or economy of operation. The Commission obviously is not precluded from using its minimum rate power under such circumstances, since such competition does not further the purpose behind the new rule of ratemaking—the assertion of inherent advantages of cost or service. Indeed, the Commission would appear obligated to halt clear-cut destructive competition in any situation where the assertion of an inherent advantage is not affirmatively involved.

In like manner, even in cases involving the assertion of inherent advantages, the Commission has the power to curb competition where rate wars are precipitated, resulting in the needless dissipation of revenues by both competing modes. Under the National Transportation Policy, the Commission must promote sound economic conditions in transportation and among the several carriers. A rate war involves weakening of the low-cost carrier as well as the high-cost carrier through dissipation of revenues necessary for their financial stability. In such cases, successive rate reductions may drive rates far below their normal level and undermine the financial stability of the carriers and their ability to render adequate service. In such a case, competition prevents particular traffic from bearing its proper

the bill we are now considering the Commission, even though it is not to hold the rate of any carrier up to any particular level for the purpose of protecting the traffic of some other mode of transportation, is nevertheless to give due consideration to the objectives of the declaration of national transportation policy which prefaces the Interstate Commerce Act. That declaration of policy, I need not tell you, discourages unfair and destructive competitive practices." 104 Cong. Rec. 10844.

share of the transportation burden. See, e.g., *Cigarettes and Tobacco, N.C. to Official Territory*, 281 I.C.C. 127, 142 (1951). Where such a rate war exists, the Commission must prevent competition from depressing rate levels to the point where the competitors destroy each other. It is in this sense that "destructive competition" has been described as "self-destruction by the competitors." Concurring opinion of Commissioner Alldredge in *Petroleum Between Washington, Oregon, Idaho, Montana*, 234 I.C.C. 609, 651 (1939) *aff'd sub nom. Scandrett v. United States*, 32 F. Supp 995 (D. Oreg. 1940), *aff'd per curiam* 312 U.S. 661 (1941).

The opinion of the district court recognizes this danger. The court refers to the fact that some traffic does not pay the carrier's full costs of service. (R. 253) Obviously, other traffic must return revenues above fully-distributed cost to offset this traffic's deficiency in revenues. At the end of its opinion, the district court holds that if Sea-Land is found to possess an inherent advantage in cost of service, then the Commission may, giving effect to value of service considerations, prescribe rates so as to return to Sea-Land more than its fully-distributed costs on particular traffic. (R. 259) The principle enunciated by the district court is both sound and realistic. Obviously, if the inherent advantages of the low-cost carrier are to be preserved, the Commission cannot allow rate wars to continue until that carrier's financial stability is jeopardized. At the same time, where neither carrier has a demonstrated inherent advantage in cost or service, the National Transportation Policy's prohibition on "destructive competitive practices" requires the Commission to halt rate wars which have the sole effect of undermin-

ing sound economic conditions among the several carriers.

Finally, the very purpose of Section 15a(3) implies a limitation on that Section's application. This purpose has been shown to be that of encouraging fair and constructive competition. This purpose is not served by permitting rate cutting to reach the point where substantial competition is eliminated. Certainly this point is reached when an entire carrier industry is destroyed. When this occurs, the competitive incentive of the surviving carrier industry to assert its inherent advantages in ratemaking is lost. Thus, if the rule of ratemaking in Section 15a(3) is applied so as to permit the wholesale elimination of competition, the very purpose of that Section is thwarted. To hope for the competitive assertion of inherent advantages by different modes of transportation would be futile where there is no intermodal competition, and hence no competitive pressure, to compel such an effort. Wholesale elimination of competition can, as well, prevent the Commission from developing and preserving "a national transportation system by water, highway, and rail . . . adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."¹²

Every one of the foregoing limitations on competition is consistent with, indeed, furthers increased competition in the transportation industry. None is inconsistent with normal, healthy competition in terms of relative efficiency and economic fitness. None is inconsistent with the elimination of the unfit under the stresses of healthy competition. All these limitations

¹² National Transportation Policy, *supra*.

are necessary to insure economically sound competitors in the long run. With the Commission exercising restraint against destructive competition, it is much more likely that the Congressional intent of encouraging competition will be served. Far from erecting an umbrella over the economically unfit, these restraints on balance favor the efficient and economically fit carrier.

The new rule of ratemaking in Section 15a(3) can thus be interpreted to serve, rather than come in conflict with, the National Transportation Policy. Thus limited, the new rule of ratemaking insures sound economic distribution of traffic within the transportation industry, consistent with sound economic conditions and continuing vigorous competition among the carriers.

II. THE INTERSTATE COMMERCE COMMISSION HAS CLEAR POWER TO PREVENT DESTRUCTIVE COMPETITION

The Interstate Commerce Commission's power to regulate carrier competition, and in particular, rail-water competition, consists basically of its power to fix minimum rates. This minimum rate power was granted to deal with a problem intrinsic to competition in transportation—the problem of destructive competition. In the instant case, it must be decided whether the Commission may exercise its minimum rate power to prevent destructive competition from extinguishing a water carrier industry.

The Commission was first given minimum rate power in the Transportation Act of 1920. The purpose in granting that power was made clear by Congressman Esch of the House Committee on Interstate and For-

eign Commerce, which prepared the appropriate legislation:

"There is an advantage in giving the commission authority to fix a minimum rate. The commission has never heretofore had that power since the original act was adopted in 1887. We give it the right of fixing the minimum rate in order that it may meet some of the problems arising out of the long-and-short haul clause as contained in the fourth section. We give it the right of fixing a minimum rate in order that it may protect a water carrier against the destructive competition of a rail carrier. You know the story—you can read it upon every mile of every inland waterway of the United States—how the water carrier started, and then the rail carrier paralleled the river bank and made a rate so low that the water carrier had to abandon its line and its route, and after such abandonment the rail carrier raised the rate and the public was no better off and was, in fact, worse off than before. If the Commission fixes the minimum rate, it can say to the rail carrier: 'Thus far you can go, but no farther.' The water carrier must be permitted to live. To do this we must provide for the minimum rate." 58 Cong. Rec. 8317, Nov. 11, 1919.

Since 1920, the Commission has repeatedly used its minimum rate power to prevent destructive competition. For example, the Commission has expressly recognized that the power to fix minimum rates was granted primarily to prevent destructive competition and to promote the financial stability of the transportation agencies. *Petroleum Between Washington, Oregon, Idaho, Montana*, 234 I.C.C. 609, 637 (1939), *aff'd sub nom. Scandrett v. United States*, 32 F. Supp. 995 (D. Ore. 1940), *aff'd per curiam* 312 U.S. 661 (1941).

Aside from the power to prevent destructive competition implicit in the means to carry out that power, the Commission is specifically directed to administer and enforce all the provisions of the Interstate Commerce Act "to encourage the establishment and maintenance of reasonable charges for transportation services . . . without unfair or destructive competitive practices." National Transportation Policy, 54 Stat. 899 (1940), 49 U.S.C., preceding sections 301, 901 and 1001.

The Commission's power to prevent destructive competition is, therefore, one of the clearest, most unequivocal powers granted that agency, going to the very heart of its authority over competing modes of transport. *That power was not repealed or eliminated by the Transportation Act of 1958.* The Transportation Act of 1958 added paragraph (3) to Section 15a of the Interstate Commerce Act. That paragraph reads:

"(3) In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act." 72 Stat. 572 (1958), 49 U.S.C. Sec. 15a(3).

The basic intent of the amendment was to encourage competition between the different modes of transport by allowing the assertion of legitimate economic ad-

vantages. The House Committee Report makes this clear:

“... the Commission consistently should follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of cost or service, giving due consideration to the objectives of the national transportation policy declared in the Interstate Commerce Act.” (H.R. Rep. No. 1922, *supra*, at page 14.)

It was made clear, however, that the fair and desirable competition resulting from the assertion of inherent advantages of cost or service was not to be confused with “destructive competition.” The Senate Committee on Interstate and Foreign Commerce made this clear:

“[The section] is designed to encourage competition in transportation by allowing each form of transportation subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to offer, *with such ratemaking being regulated by the Interstate Commerce Commission, however, to prevent ‘unfair or destructive competitive practices’ as contemplated by the declaration of national transportation policy.* Under the committee amendment the principal emphasis, but not the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies.” S. Rep. No. 1647, 85th Cong., 2d Sess. 3-4 (1958), (emphasis supplied). See also H.R. Rep. No. 1922, *supra*, at pages 13-14.

The sponsors of the amendment emphasized repeatedly that the Commission was to continue to prevent de-

destructive competition. As Congressman Harris asserted: "We do not permit any carrier to engage in destructive competitive practices." 104 Cong. Rec. 12532. See also 104 Cong. Rec. 10844 (Senator Bricker), 104 Cong. Rec. 10859 (Sen. Smathers). In addition, the Commission was expected, under the new amendment, to follow the decision in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475 (1945). (Congressman Harris, 104 Cong. Rec. 12531.) In that decision, expressly recognizing that its minimum rate power was conferred "mainly to prevent destructive competition" and to permit adequate earnings, the Commission held:

"What constitutes a minimum reasonable rate is a matter to be determined in the light of the facts of record in each individual case, avoiding arbitrary action and keeping within statutory and constitutional limitations, just as in the case of maximum reasonable rates. Whether a rate is below a reasonable minimum depends on whether it yields a proper return; whether the carrier would be better off from a net-revenue standpoint with it than without it; *whether it represents competition that is unduly destructive to a reasonable rate structure and the carriers*; and whether it otherwise conforms to the national transportation policy and the rules of ratemaking declared in the act of 1940." 259 I.C.C. 534 (emphasis supplied).

In seeking to promote intensified competition, Congress obviously did not intend to curb the Commission's power to prevent destructive competition. Clearly the assertion of inherent advantages in cost or service produces the healthy form of competition which Congress wished to encourage. Congress did not, however, open the door to "destructive competitive

practices." Such practices are not the product of legitimate economic advantage and have no place in a sound transportation industry.

The court below did not expressly deny the Commission's power to prevent destructive competition. The court did, however, define destructive competition so narrowly as to eliminate it as an independent standard in the National Transportation Policy. Far from the unequivocal Congressional intent regarding the prevention of such destructive practices, the court below in effect held that destructive competition can be prevented only where necessary to preserve the inherent advantages of a particular carrier. Far from considering destructive competition as the *raison d'être* for the Commission's minimum rate power, the district court reduces this criterion to a special case in the preservation of inherent advantages.

III. DESTRUCTION OF ONE CARRIER INDUSTRY BY ANOTHER CONSTITUTES "DESTRUCTIVE COMPETITION," WHICH THE COMMISSION MUST PREVENT, IN THE ABSENCE OF PROVEN INHERENT ADVANTAGES JUSTIFYING SUCH DESTRUCTION

The court below held that the prohibition on differentials in Section 15a(3) is to be qualified only when necessary because of the interplay of two factors—the "inherent advantage" factor and the "destructive competitive practice" factor. (R. 252) The court committed a fundamental, basic error. *There is no interplay at all between the two factors.* The assertion of inherent advantages of cost or service produces fair and constructive competition. Such competition is completely consistent with promoting "safe, adequate, economical, and efficient service," and the fostering of "sound economic conditions in transportation and among the several carriers," as the Commission

is required to do under the National Transportation Policy. On the other hand, the court failed to comprehend that destructive competition is something quite different. Such competition is not the product of inherent advantages of cost or service—it involves the exertion of predatory power that has nothing to do with relative efficiency or economic fitness. The court has totally failed to recognize the destructive tendencies of transportation competition—tendencies which led to the granting of minimum rate power to the Commission and which were fully recognized by Congress in enacting Section 15a(3). The significance of these tendencies was clearly stated by Chairman Freas of the Commission in testifying before the Surface Transportation Subcommittee of the Senate Committee on Interstate and Foreign Commerce, March 28, 1958:

“I believe that if transportation history teaches any one thing, it is that while competitive forces generally are effective in reducing prices and improving standards of service, these very same competitive forces in the transportation field, if unchecked, will result in eliminating competition and in disrupting reasonable and fair rate relations as between competing shippers, geographical areas, and territories.”¹³

In dealing with these destructive tendencies, in the case at bar the Commission considered the *elimination of coastwise water carrier competition* as an extraordinary situation requiring more than the mechani-

¹³ Hearings Before the Subcommittee on Surface Transportation of the Committee on Interstate and Foreign Commerce, “Problems of the Railroads,” U.S. Senate, 85th Cong., 2d Sess., Part III, at page 1842.

cal application of cost formulas. In finding such destruction contrary to the National Transportation Policy, the Commission considered many factors. But the court below held that the Commission is reduced to the role of a cost finder and must blind itself to the fact that an entire carrier industry will be destroyed. As the court stated:

“Apparently the Commission thought that any rate-competition which threatens the continued existence of a competitor it had power to prevent as a ‘destructive competitive practice,’ irrespective of whether the challenged rates were compensatory to the proponent thereof or whether the mode of the contesting competitor was a lower-cost mode than that of the proponent. This, we hold, was an erroneous interpretation of the Act, as amended.” (R. 249)

The district court, in effect, held that competition is destructive only where rates are harmful to the proponent, i.e., are noncompensatory, or where a competitor is deprived of its inherent advantage as the lower-cost mode. (R. 251-252). By relating destructive competition solely to costs, the court has arrived at a superficially logical solution. But, in this mechanical approach to the problem, the court treated the elimination of the coastwise carrier industry as an irrelevancy which must be ignored. And in the very competitive situation at bar, where, according to the district court, neither carrier was found to have a proven inherent advantage in cost or service, the court has doomed the coastwise carriers to destruction from predatory power not based upon efficiency or economy of operation. The court has so rigidly adhered to its definition of destructive competition in terms of costs that it has applied that definition where it has no possible application.

Faced with the practical task of preserving a balanced transportation system by all modes, the Commission adopted a much more realistic approach. It viewed the demise of the coastwise carriers as, at the very least, warranting review of the desirability of their continued existence. The district court has condemned the Commission for doing what the seriousness of the situation demanded, namely, for treating the destruction of the coastwise carriers as at least requiring clear justification. Under the National Transportation Policy, the Commission could do no less.

In the present case, the railroads were unable, on the grounds of inherent advantages or otherwise, to justify the destruction of the coastwise carrier industry. In the absence of a showing of justification on the part of the railroads as the low cost carriers or on other grounds warranting the elimination and destruction of coastwise water transportation, the Commission necessarily condemned the proposed rail rates. No other result could be reached. The railroads had the burden of proving the lawfulness of their rates—a burden which they failed to sustain. As the district court observed, under Section 15(7) of the Act, “the burden of proof shall be on the carrier [who seeks a rate-change] to show that the proposed changed rate . . . is just and reasonable.” (R. 258) As proponents of the reduced rail rates, the railroads had the burden of showing their own costs. (R. 258) The railroads’ failure to show these costs, specifically noted by the district court (R. 255), was obviously the primary reason the Commission was unable to determine which type of carrier possessed an inherent advantage of cost. Any possible indeterminacy in cost due to cer-

tain "variables," referred to by the Commission (R. 36) could not have been decisive in the total absence of costs as to certain of the rail rates. Under the circumstances, the only finding permissible under Section 15(7) was that the proposed rail rates "are not shown to be just and reasonable."

The district court avoids this conclusion by holding that in a proceeding involving competing modes of transportation, the protestants (i.e., the water carriers) have the burden of showing their own costs. The holding is irrelevant, for Sea-Land *did* show its costs. The only failure to adduce relevant costs noted by the Commission, and the district court was on the part of the railroads. (R. 36, 255) The district court was in error in rejecting the government's argument that the railroads failed to sustain their burden of proof. (R. 257-258) Considering such failure, the Commission was completely justified in preventing the destruction of the coastwise carriers.

Carefully considering the factual situation before it, the Commission found destructive competition. To attract traffic, the coastwise carriers must establish rates somewhat below rail rates. (R. 34) The proposed rail TOFC rates are established on a parity with sea-land rates. (R. 35) The water carriers convinced the Commission that they would be compelled to reestablish their rates on a depressed basis below rail TOFC rates, that "the rate-cutting activity probably would not stop even at that destructive level, and that quite certainly a further vicious cycle of rate cutting would ensue." (R. 29)

On the other hand, the water carriers must recover their fully distributed costs on the overall sea-land

operation to continue in business. (R. 35) • There were, therefore, ample findings to support the Commission's conclusion that:

“The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence, of the coastwise water-carrier industry generally.” (R. 38)

Obviously, the Commission was faced with the opening campaign in a rate war. Far from enhancing competition, such a rate war could only have the effect of eliminating it.

In judging the destructive nature of the ensuing war, the court below disregarded an extremely significant fact. In its opinion, the court included as one of the Commission's essential findings:

“4. All Sea-Land traffic is competitive with the railroads. But only a fraction of railroad traffic is competitive with Sea-Land. R. 45.” (R. 246)

The clear advantage thus given the railroads in a destructive rate war was made clear in the Commission's decision:

“All of Pan-Atlantic's traffic is competitive. On the other hand, Pan-Atlantic argues that the traffic which the railroads seek to retain or obtain in competition with Pan-Atlantic and Seatrain constitutes only a small part of their total traffic in the areas here affected, and that because of the volume of their noncompetitive traffic the railroads could, if permitted to do so, reduce their sea-land competitive rates to an out-of-pocket cost basis and make up most or all of the difference

between that level and their fully-distributed costs on other traffic." (R. 35) "

The rate reductions before the Commission were, therefore, selective rate cuts and part of a program of rate reductions which would put the coastwise carriers out of business.

The court below held that a conclusion as to destructive competition could not be bottomed upon these

"This precise factual situation was raised by Sen. Kefauver during debate on the new rule of ratemaking: "My question with relation to section 5 is this: A barge line competes with a railroad in all of its services; but a railroad may compete with a barge line only with respect to a very small part of the railroad service.

"As I understand section 5, the Interstate Commerce Commission may allow a railroad to make a rate to compete with a barge line with respect to that part of the system where it does compete with barge lines, on the basis of its out-of-pocket expense, without considering its overhead. The overhead may be made up in that part of its operations with respect to which it does not compete with the barge line.

"Is that situation still possible under section 5, or does the language giving due consideration to the objectives of the national transportation policy declared in this act require the railroad to take into consideration a part of its overhead in making its rate to compete with the barge line?" 104 Cong. Rec. 10858-10859.

Sen. Smathers replied that it was intended to permit the Commission to approve rates of a given mode of transportation, irrespective of the direct relationship it may have to the rates of another mode, "so long as such rates do not result in unfair competitive practices." 104 Cong. Rec. 10859.

Sen. Kefauver persisted: "I should like to ask a question of the Senator from Florida. Some people have expressed the belief that under the provisions of section 5 it would be possible for one type of carrier to lower its rate to such an extent that another carrier would not be able to compete fairly on the basis of charging the overhead to that other carrier. There is nothing in the provision contained in section 5, is there, which would enable one carrier to take undue advantage of another carrier, beyond the general policy set forth in the National Transportation Act?"

Sen. Smathers. "No. The answer is no." 104 Cong. Rec. 10859.

findings. This conclusion was, however, consistent with prior Commission decisions and in accord with destructive competition as defined under similar statutes. The Commission has held that successive retaliatory rate reductions by competing carriers constitute a destructive rate war and accomplish no more than a needless dissipation of the competitors' revenues. In many decisions, the Commission has found that such run-away rate cutting constitutes destructive competition: *Tobacco From North Carolina To Central Territory*, 309 ICC 347 (1960) at page 361; *Bituminous Coal Via Motor-Rail From Lynnville, Ind. To Chicago, Ill.*, 313 ICC 573 (1961) at page 576; *Alcoholic Liquors From N.H. and N.Y. to Tex. and La.*, 315 ICC 124 (1961); *Sugar, South to Indiana, Ohio River, Intermediate Points*, 315 ICC 521 (1962) at pages 527-528; *Agricultural Insecticides—Heyden, N.J., to Houston, Tex.*, 315 ICC 623 (1962) at pages 625-626.

The soundness of the Commission's decision is also confirmed by the interpretation given "destructive competition" under other statutes. In *New York Central Railroad Company v. United States*, 194 F. Supp. 947 (S.D. N.Y. 1961), aff'd *per curiam* 368 U.S. 349 (1962), the court relied upon court decisions interpreting unfair competition or practices under the Federal Trade Commission Act of 1914 and the Shipping Act of 1916. The court found that these decisions furnished support for the Commission's finding as to an "unfair or destructive competitive practice" under the Interstate Commerce Act.

As in the *New York Central* case, the Commission's conclusion regarding "destructive competition" finds ample support in court decisions under the Clayton

and Robinson-Patman Acts. For example, in *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954), reh. den. 348 U.S. 932 (1955), the defendant destroyed a local competitor by discriminatory price cutting. There, as in the instant case, this destruction was accomplished by a price war. The destructive potential of discriminatory price-cutting was clearly described by this Court:

"We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns." 348 U.S. 119.

In the instant proceeding the competitive advantage of the railroads stems not from their "skills or efficiency," there being no finding of inherent advantages on their part, but instead from "their strength and ability to wage price wars."

As the court observed in *Balian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796 (S.D. Cal. 1952), aff'd 231 F. 2d 356 (1955), cert. den. 350 U.S. 991 (1956), price discrimination may violate the Sherman, Clayton or Robinson-Patman Acts, and "... price discrimination, predatory in nature, is an accepted method of destroying competitors." 104 F. Supp. 800.

The Commission was, therefore, completely justified in finding destructive competition in the incipient rate war before it. The existence of the coastwise carriers was threatened, and there was no inherent advantage on the part of the railroads to provide economic justification for the destruction of the coastwise industry. In establishing rate parity, the railroads' rates went below the level necessary to meet the competition of the water carriers. The court below clearly erred in finding that the Commission could not find destructive competition on this state of facts.

Despite the fact that a full-fledged rate war was the inevitable consequence of the rail rate reductions, the court below insists that the Commission is powerless until the rates of the competing carriers have reached a non-compensatory level. Referring to this rate war, the court stated:

"But surely, under its power to fix minimum rates, 49 U.S.C. sec. 15(1), the Commission will have power to disapprove rates not compensatory." (R. 257)

In the first of its "essential findings," the court clearly recognizes a compensatory rate to be one which covers out-of-pocket costs. (R. 245, see also footnote 7, R. 245) Thus, the court denies Commission power to halt rate wars until the out-of-pocket cost level has been reached.

In the court's view, the Commission has no *preventive* power against the debilitating effects of a rate war. It must stand idle until cutthroat competition has rendered the carriers incapable of meeting their overhead obligations. Considering the sixth "essential finding" that Sea-Land must recover fully-distributed costs to remain in business (R. 246), the court has virtually guaranteed the destruction of that carrier. The court has placed a premium on ability to engage in out-of-pocket ratemaking that is completely inconsistent with its view concerning "inherent advantages." It has opened the door to destructive rate wars in which victory depends upon abilities not reflecting superior efficiency or lower *total* costs of operation.

It is quite clear from the district court's opinion that the level of a carrier's out-of-pocket costs is not an "inherent advantage" which the Commission is obliged to recognize. As the court clearly states: "Thus the 'inherent advantages' of lower cost (or better service, which is discounted for price) refers to the long-run, or fully-distributed, costs of carriage." (R. 248, see also footnote 10a to the court's opinion, R. 248) Despite this conclusion, the district court lays down a definition of "destructive competition" which permits destruction of competitors through a non-economic advantage, i.e., superior ability to engage in rate making below fully-distributed costs. This ability depends not upon superior economic efficiency but instead upon the volume of noncompetitive traffic to which overhead or constant costs can be shifted. In such a struggle, the coastwise carriers are at a decisive disadvantage for, as the Commission found:

"4. All Sea-Land traffic is competitive with the railroads. But only a fraction of railroad traffic is competitive with Sea-Land." (R. 246)

But the district court in effect dooms the coastwise carriers to destruction by restricting the Commission's power to halt a "full-fledged rate war" only when rates have been reduced to noncompensatory levels. (R. 257) The district court completely fails to recognize that carriers may be destroyed by a competitor's rates which cover out-of-pocket but not fully-distributed costs. This conclusion is, of course, completely inconsistent with the Commission's finding that Sea-Land must recover fully-distributed costs to remain in business.

Obviously the Commission must have power to prohibit the unnecessary and exhausting dissipation of revenues which results from rate wars if competition by smaller carriers is to be preserved at all. Successive and retaliatory rate-cutting needlessly dissipates the revenues of the competing carriers even before out-of-pocket levels are reached. Such a contest of ability to reduce rates to the out-of-pocket level involves the employment of predatory advantages no less than a rate war testing the competitors' ability to absorb out-of-pocket losses. Unless the Commission has power to protect the transportation industry from the deleterious effects of both kinds of rate wars, certainly the Commission's minimum rate power has become meaningless.

IV. FULLY-DISTRIBUTED COST, AS DETERMINED BY THE INTERSTATE COMMERCE COMMISSION, IS THE PROPER CRITERION FOR IDENTIFYING INHERENT ADVANTAGE IN COST OF SERVICE

It has been shown that the Commission's decision was sound in fact and in law, and that the district court erred in reversing the Commission, primarily out of a failure to comprehend the nature of "destruc-

tive competition". But the district court has proceeded to lay down criteria ostensibly to govern the case should the proceeding be reopened before the Commission. In large measure these criteria assume a determination by the Commission as to the inherent advantages of the competing modes, a determination it was unable to make on the record before it. The significance of these criteria as a precedent makes it imperative that these standards be dealt with in succeeding parts of this brief. For purposes of subsequent argument, it may be necessary on occasion to assume a determination as to inherent advantages. Such assumption is without prejudice to the foregoing contention that the Commission was correct in deciding the case before it without regard to, and in the absence of, a determination of inherent advantages.

In applying the "inherent advantages" criterion, the district court has again fallen into error. The court failed to perceive that the preservation of inherent advantages of cost has two facets: first, allowing a low-cost carrier to assert its inherent advantage by attracting traffic through lower rates, *and second, protecting a low-cost carrier's traffic from rate-cutting by the high-cost carrier.* The intensification of competition contemplated by the Transportation Act of 1958 consists not only of increased freedom in ratemaking—it also consists of curbing such freedom where competition by the low-cost carrier is jeopardized. If competition is to be promoted, it must be restrained where it reaches the point of eliminating the more efficient competitors.

The guide lines laid down by the district court do not assure the preservation of low-cost competition. The general principles enunciated by the court are correct. But the manner in which those principles are applied

by the district court establishes a dangerous precedent which, if consistently followed, may actually thwart the purposes of the new rule of ratemaking.

The court below correctly stated that "lower cost of equipment, operation, and therefore service" is precisely the kind of inherent advantage the Commission must preserve. (R. 248, note 10a) *Interstate Commerce Commission v. Mechling*, 330 U.S. 567, 575 (1947); *Dixie Carriers v. United States*, 351 U.S. 56, 59 (1956); *Schaeffer Trans. Co. v. United States*, 355 U.S. 83, 91 (1957) ("[t]he ability of one mode of transportation is precisely the sort of 'inherent advantage' that the congressional policy requires the Commission to recognize"). The court correctly interpreted such advantages as long-run advantages:

"The first policy-factor mentioned in the NTP declaration is to 'recognize and preserve the inherent advantages of each [mode of transportation].' By 'the inherent advantages' was meant the ability of a mode of transportation over the long run to provide a transportation service more acceptable to its shippers, by reason of quality or price, than that offered by a competing mode. That the calculation was to be long-run must be emphasized. The shorter-run 'out-of-pocket' costs of one mode (e.g., railroads) may be lower than the longer-run 'fully-distributed,' or even the shorter-run costs of competing modes (e.g., water carriers) whose long-run costs are lower. When they are, rates set reference to out-of-pocket costs may favor what in the long run is the less efficient, higher-cost mode. Thus the 'inherent advantages' of lower cost (or better service, which is discounted for price) refers to the long-run, or fully-distributed, costs of carriage." (R. 247-248)

The court below was absolutely correct in identifying "longer-run fully-distributed" costs as the measure of inherent advantage in cost of service. The economic reasoning behind this principle is eminently sound. This was explained by Chairman Freas of the Interstate Commerce Commission in testifying before the Surface Transportation Subcommittee of the Senate Committee on Interstate and Foreign Commerce on March 28, 1958:

"It is the Commission's endeavor so to perform its ratemaking functions as to protect the public interest in conformity with the policy laid down by the Congress. In so doing we try to accord to each mode of transportation every advantage to which the characteristics of its operation entitle it. We undertake to construct rates so as to encourage the flow of traffic via the most economical form of transportation.

"The most economical form of transportation is that form which, if rates reflected costs, would tend to be favored by shippers. For the purpose of ascertaining the most economical form of carriage, full costs should be the test. It is full costs that must be returned to the carriers if the transportation industry is to be kept healthy and vigorous." (Hearings, *supra*, footnote 13, page 1839)

This reasoning was reiterated by Chairman Winchell of the Commission in testifying before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce on June 17, 1960:

"The main purpose of the Commission, in the area of competitive rate making, is the protection of the public interest in accordance with the policy established by the Congress. It therefore follows logically that each mode of transportation must

under that policy, be given every opportunity to utilize to the fullest whatever advantages may be characteristic of its particular operation. In this manner, rate construction is founded upon a basis which encourages the flow of traffic by way of the most economical form.

"It is of particular importance, if the Commission is to encourage the movement of traffic by the most economical mode, that we have full factual information available relating to costs. The most economical mode should be determined by using full costs as a basis."

Fully-distributed costs reflect a carrier's economic fitness over the *long run*. They measure the carrier's ability to handle traffic at the lowest *over-all* cost on a permanent basis. As the court below stated, "'Fully-distributed costs' of operation are actually the ICC's estimate of returns necessary to continued profitable operation." (R. 253) As the legislative history of the new rule of ratemaking suggests, this is precisely the kind of advantage that Congress wished to see asserted in increased competition:

Having recognized the significance of fully-distributed costs, the court then reveals a misconception as to how such costs are derived. The court correctly recognizes that value-of-service reflects ability to pay for transportation service. (R. 252) But the calculation of fully-distributed costs, and hence the identification of the low-cost carrier, is not based upon value of service or ability to pay.

"Fully distributed costs based on the out-of-pocket costs plus a revenue-ton and revenue ton-mile distribution of the constant costs, including deficits, indicate the revenue necessary to a fair return on the traffic, *disregarding ability to pay*." *New*

Automobiles in Interstate Commerce, 259 I.C.C. 475, 513 (1945) (emphasis supplied).

It is not true that the fully-distributed costs ascertained by the Commission reflected "an estimate of what contribution to total revenue the high-value commodities here involved should make." (R. 254) The fully-distributed costs of both the railroads and Sea-Land were computed to reflect the "revenue necessary to a fair return on the traffic." Obviously the court's misconception of how fully-distributed costs are computed led it into the error of rejecting comparative TOFC and Sea-Land costs as "incommensurate quantities." (R. 254)¹⁵ Aside from the fact that certain variables, such as transporting one or two trailers on a flatcar, and the shift of Sea-Land traffic from one port to another, prevented precise and final determination of full costs (R. 36), the procedures followed by the Commission were proper. Fully-distributed costs, as calculated by the Commission, furnished a valid basis for determining the low-cost carrier.

But the court below went even further. It held that Sea-Land could not be protected from destructive competition unless it was shown to be the *overall low-cost*

¹⁵ The Court below has fallen into serious error by attempting to substitute its own judgment for that of the Commission as to subject matter involving expert judgment. As this Court observed in *New York v. United States*, 331 U.S. 284, 328 (1947): "We start, of course, from the premise that on a subject of transportation economics . . . the Commission's judgment is entitled to great weight. The appraisal of cost figures is itself a task for experts, since these costs involve many estimates and assumptions and, unlike a problem in calculus, cannot be proved right or wrong. They are, indeed, only guides to judgment. Their weight and significance require expert appraisal." The court below obviously did not approach the Commission's judgment in such a manner.

mode. (R. 255-256) In other words, Sea-Land could derive no protection from rate reductions on the higher-cost (and higher quality)¹⁶ TOFC service unless it provided a lower-cost service than both TOFC and boxcar service. Thus, the inherent advantage of lower-cost Sea-Land service could not be preserved from rate cutting on TOFC traffic unless Sea-Land also provided lower-cost service than boxcar service. Under this reasoning, any inherent advantage Sea-Land might possess vis-a-vis TOFC service is completely dissipated.

The complete inconsistency of this reasoning is shown by the court's admonition that "a railroad rate for a particular movement, if it yields the railroad's fully-distributed cost which is lower than the water carrier's fully-distributed cost, may not be disturbed." (R. 259) The effect of the court's ruling is that the Commission *may not* preserve Sea-Land's inherent cost advantages compared with rail TOFC service, but *must* preserve the railroad's inherent cost advantage on *specific* traffic.

If the Commission is to preserve inherent advantages of lower cost, it must do so on a more consistent basis than that proposed by the district court. If a carrier is the low-cost mode on a particular movement, obviously its inherent advantage must be preserved from rate cutting *on that particular movement*. If a carrier is *in general* a lower-cost mode, obviously it must be preserved from over-all destruction by a higher-cost mode. If the preservation of inherent advantages means anything, it must mean the preservation of the low cost mode, both on an over-all basis and as to its rates on particular traffic.

¹⁶ See "essential finding" No. 3. (R. 246)

The foregoing principles are basic to a consistent interpretation of the new rule of ratemaking. The rule is intended to promote greater freedom in the assertion of inherent advantages. If the Commission is to be "consistent," however, this rule of ratemaking implies *restraint* as well as *freedom*. The Commission may not allow competitive situations to develop which jeopardize the assertion of inherent advantages. As the district court itself recognized, "It was thought undesirable that one mode should undercut the rates of a competing lower-cost mode." (R. 248) The prohibition against holding up the rates of one mode to protect the traffic of another mode clearly cannot be invoked by a mode without a proven inherent advantage in cost or service. Equally as clearly, it should not be necessary for the existence of the lower-cost mode to be in jeopardy before its inherent advantage is to be preserved.

These principles mean that Sea-Land should be protected from rate cutting on rail TOFC service, if Sea-Land service enjoys an inherent advantage of lower costs, regardless of whether Sea-Land's existence is threatened thereby. In other words, there is no justification for requiring Sea-Land to prove that its "integral overall rate structure" is in jeopardy and must be protected under the National Transportation Policy in order for the Commission to protect its inherent advantages of cost *vis-a-vis* rail TOFC service. The reasoning adopted by the district court would permit a carrier, by cutting rates on higher value and higher cost service, to deprive another carrier of traffic to which it is entitled on the basis of superior economic efficiency as compared to that service.

On the other hand, the district court has treated properly the second way in which preservation of the

low cost carrier may be required. Where a carrier is *in general* the low-cost mode, the district court recognizes that value of service considerations may demand rates for that carrier above its fully-distributed costs. (R. 259) In other words, Section 15a(3) does not compel the Commission to allow rate levels to be depressed to the low cost carrier's fully-distributed costs on *all* segments of traffic. Value of service considerations may require substantial tonnage to be carried at rates below fully-distributed costs, as has been indicated above. If, therefore, the Commission were precluded from protecting *any* of the low cost carrier's rate levels above its fully-distributed costs, the continued operation of the low cost carrier would be jeopardized. Such a result would thwart, rather than further, the low cost carrier's inherent advantage.

It is thus essential that in any case where a carrier possesses an inherent advantage the Commission be permitted, as the district court has indicated, to protect that carrier's rates on specific traffic at levels above its fully-distributed costs. As the district court suggests, the preservation of such an inherent advantage of the low cost carrier would also justify holding the rates of the higher cost carrier above its fully-distributed costs. (R. 259, cf. R. 255-256) Thus, insofar as a carrier possesses an inherent advantage of lower cost, its rate levels should be permitted to reflect value of service considerations to the end of preserving its inherent advantages. Rate levels for the low cost carrier which reflect value of service are necessary to both the continued existence of that carrier and the furtherance of the purposes of Section 15a(3).

CONCLUSION

In the instant case, the Commission properly invoked its clear statutory power to prevent destructive competition. The validity of its decision is unaffected by the new rule of ratemaking in Section 15a(3) of the Interstate Commerce Act, since the rail rate reductions at issue were not shown to involve the assertion of inherent advantages of cost or service. The District Court was correct in identifying fully-distributed costs as the proper measure of inherent advantages of cost and in affirming the Commission's power to fix minimum rates above fully-distributed costs to protect a carrier's inherent advantage of cost, but erred in rejecting the Commission's method of calculating fully-distributed cost.

Accordingly, the judgment of the District Court should be reversed.

Dated: January 8, 1963.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 110.

SEATRAN LINES, INC.,

Appellant,

v.

THE NEW YORK, NEW HAVEN and HARTFORD
RAILROAD COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT.

APPELLANT'S BRIEF.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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APPELLANT'S BRIEF.

Opinions Below.

The opinion of the United States District Court for the District of Connecticut (R. 241) is reported in 199 F. Supp. 635 (1961), the decision of the Interstate Commerce Commission (R. 4) in 313 I. C. C. 23 (1960).

Jurisdiction.

Probable jurisdiction was noted October 8, 1962, 371 U. S. 808 (R. 273), and this case consolidated with Nos. 108, 109 and 125 which are separate appeals from the same judgment by the Interstate Commerce Commission,

Sea-Land Service, Inc. and the United States, respectively. (R. 274). The jurisdiction of this Court to review the judgment and decision of the District Court by direct appeal is conferred by 62 Stat. 926 (1948), 28 U. S. C. §1253 (1958) and 62 Stat. 961 (1948), 28 U. S. C. §2101(b) (1958).

Statutes Involved.

The following statutes are involved: Interstate Commerce Act, §§15(7), 15a, 305(c) and 307(d) (49 U. S. C. §§15(7), 15a, 905(c) and 907(d) (1958)), [hereinafter referred to as the Act] and the National Transportation Policy (49 U. S. C. preceding §§1, 301, 901 and 1001 (1958)). The foregoing statutes are set forth in the Appendix.

Questions Presented.

The questions presented by this appeal are as follows:

1. Whether in determining the reasonableness of drastically reduced rail rates, which are limited to points served by water carriers and which are designed to divert traffic from regulated common carriers by water, the Interstate Commerce Commission is required to place exclusive reliance on the costs of the competitive rail and water services?

2. Whether Section 15a(3) of the Act, as added to the Act in 1958, made a major modification in the National Transportation Policy, so as to make costs of providing service the principal, if not the exclusive, criterion by which the lawfulness of competitive rate reductions must be determined?

3. Whether the Interstate Commerce Commission's findings that certain reduced railroad trailer-on-flat-car rates would preclude the coastwise water

carriers from competing at equal rates with the railroads' service, would result in a vicious cycle of rate cutting and would threaten the continued existence of the coastwise water carrier industry generally and its further findings that coastwise shipping is important for national defense purposes and is an important and essential part of a national transportation system adequate to meet the needs of the commerce of the United States justify the conclusion of the Commission that the appellee railroads failed to sustain their statutory burden of proof "that the proposed changed rate * * * is just and reasonable" under Section 15(7) of the Interstate Commerce Act?

Statement of the Case.

The order of the Interstate Commerce Commission, which is under review in this action, directed the cancellation of some 66 of the railroad appellees' drastically reduced trailer-on-flat-car (TOFC or "piggy back") rates on various commodities between eastern points, on the one hand, and Dallas and Fort Worth, Texas, on the other hand. Appellees' rates were limited to points served by water carriers now operating in the Atlantic-Gulf trade, namely Seatrain Lines, Inc. and Sea-Land Service, Inc. (referred to in the Commission's reports below under its former name, Pan-Atlantic Steamship Corporation) and were concededly designed to divert traffic from Seatrain and Sea-Land.

Seatrain is a common carrier by water certificated by the Interstate Commerce Commission for transportation of commodities generally between the port of New York and the Gulf ports of New Orleans, La., and Texas City, Texas and between the ports of New York and Savannah, Ga. Seatrain's service consists of transporting freight in railroad cars on its ocean going vessels. The railroad cars

move to the dockside of Seatrain's vessels, are lifted on to them and are moved by water between the ports served by Seatrain. At the port of destination, the rail cars are removed from Seatrain's vessels and then proceed by rail to the consignee. Seatrain's service is commonly known as a rail-water-rail, non-break-bulk service.*

Sea-Land's water operations are substantially similar to those of Seatrain, except that Sea-Land's vessels carry demountable highway trailers instead of rail boxcars. Sea-Land's service is commonly known as a motor-water-motor, non-break-bulk service.

The railroad appellees' TOFC service is a non-break-bulk motor-rail-motor service, wherein goods are transported by highway trailer over the road, are then transported on rail flatcars in the same trailers over the rails and subsequently proceed in the same trailer over the road to their ultimate destination. TOFC, or "piggy back" service, was not provided in any substantial volume by the appellees until recent years.

Prior to 1957 the rates set for TOFC service were generally on a parity with those in force for motor carrier service and somewhat higher than all rail boxcar service. All rail boxcar rates were maintained at higher levels than water rates and combination water-rail and water-motor rates "because of disadvantages in the water service due to perils of the sea, slower transit time and infrequency of sailings". (R. 11).

Because of these disabilities it has been impossible for Seatrain to attract any traffic at equal rates to all rail boxcar service and the Commission has repeatedly found that all rail boxcar service is superior to Seatrain's service.

* Its operations have been the subject of litigation before this Court in *United States v. Pennsylvania R. R.*, 323 U. S. 612. (1945).

Wrought Pipe and Fittings, 234 I. C. C. 347, 391 (1939); *Liquor From North Atlantic Ports to Savannah*, 289 I. C. C. 104, 105 (1953); *Iron and Steel from Edgewater, N. J. to Savannah, Ga.*, 294 I. C. C. 411, 417-419 (1955). Since TOFC service is admittedly superior to all rail boxcar service, it necessarily follows that TOFC service is superior to Seatrain's service.

In 1957, the appellee railroads filed the rates for their TOFC service in issue here with the Commission which were substantially on a parity with the rates of Seatrain and Sea-Land. (R. 18). In connection with such rates the appellees also applied to the Commission for relief from the provisions of Section 4(1) of the Act (49 U. S. C. 4(1)) since their proposed reduced TOFC rates would result in higher rates between intermediate points in shorter hauls than in the longer hauls between East Coast and Texas points in violation of Section 4(1) of the Act.

The proposed reduced TOFC rates and the Fourth Section application were opposed by Seatrain, Sea-Land, a motor carrier association, the Secretary of Agriculture and several municipal authorities.

The rates were suspended and placed under investigation in the Commission's I. & S. Docket No. 6834, *Piggy-Back Rates—Between East and Texas*. On December 19, 1960 the Commission issued its decision on the proposed reduced TOFC rates and ordered that the proposed rates be cancelled on the ground that they were not shown to be just and reasonable. Fourth Section relief was also denied. (R. 42).*

* The Commission issued a consolidated report, I. & S. No. M-10415, *Commodities—Pan Atlantic Steamship Corporation*, which embraced I. & S. Docket No. 6834, *Piggy-Back Rates—Between East and Texas*, along with other dockets. Only the rates involved in I. & S. Docket No. 6834 are in issue here.

Extensive basic and essential findings of fact were made by the Commission with respect to the relative costs and relative value of TOFC and water services and the public need for and public interest in maintaining a sound economic water carrier system in support of its conclusion that the reduced TOFC rates were unjust and unreasonable.

Relative Costs of the Service Findings.

The Commission generally found sea-land* costs to be below TOFC costs but for the following two exceptions:

“The restated sea-land costs, both out-of-pocket and fully distributed, are below the restated TOFC costs for all movements of comparable weight as computed for railroad-owned flat cars having a capacity of a single trailer and equipped with tie-down devices. In connection with flat cars not presently owned but leased by the railroads, designed to hold two trailers with special hold-down devices (called TTX cars), the restated sea-land costs are below the restated TOFC costs for all except two of the 66 movements listed in the restatement. We conclude that, generally, for the movements herein, the costs of record indicate that sea-land is a lower cost service than TOFC”. (R. 21).

“The restated sea-land costs, both out-of-pocket and fully distributed, are below the restated TOFC costs for all movements on which the proposed TOFC rates would apply, as computed for flat cars with a single trailer, and also for all but two of the 66 movements computed for two trailers on a TTX car.” (R. 36).

* The sea-land service refers to the truck-water-truck service offered by Sea-Land Service, Inc., formerly Pan-Atlantic Steamship Corp. The Seatrail rail-water-rail service is, of course, also a “sea-land” type service.

Relative Value of the Service Findings.

The Commission found the services of the water carriers, particularly those of Seatrain, to be inferior, from the standpoint of the shipping public, to the TOFC services of the appellees. It pointed out that the "rail carriers regard Seatrain as offering a lower-quality service than TOFC, and TOFC service as generally of higher quality than all-rail boxcar service" (R. 26) and that to "the extent that all-rail service has certain service disadvantages [as compared with door-to-door motor carrier service], such as in the case of a shipper not located on a private siding, these disadvantages also generally beset the Seatrain service". (R. 26). The Commission also concluded that "sea-land service is generally slower than TOFC service" (R. 27) and that "[u]ncertainty of ocean transport, infrequency of sailings, and longer transit time than by TOFC, are factors present both in sea-land and Seatrain service." (R. 28).

The service disadvantages of Sea-Land and Seatrain services are reflected in the extent of their public patronage with respect to the carriage of various commodities. For example, the Commission found that Seatrain "participated in only a small portion of the ammunition traffic" and "in only a very small portion of the candy traffic" between the points involved in this case. The Commission concluded that if these "differentials favorable to Seatrain were replaced by rate equalization, its competitive position would worsen considerably." (R. 24-25). Similarly, with respect to Sea-Land's services, the Commission found that there "is no indication that Pan-Atlantic [Sea-Land] has moved any traffic at rates as high as computing all-rail boxcar or TOFC rates." (R. 22). The Commission further noted that "the pre-

ponderance of the testimony on these records is to the effect that most of the shippers prefer rail service to sea-land service except at lower rates for the latter" and that the "records show no instance of any traffic moving by sea-land except at rates lower than the rail rates." (R. 34). On the basis of this evidence the Commission concluded that "in order to attract traffic, the sea-land service must establish rates somewhat below those of the rail carriers from and to the same points, and that Sea-train, whose rates and service are comparable to Pan-Atlantic's, is in a like position." (R. 34).

The Public Interest Findings.

The Commission also supported its action by making a number of public interest findings as contemplated by the National Transportation Policy. In discussing the National Transportation Policy and its relationship to Section 15a (3) of the Act, the Commission found that "cost is only one of the elements which may appropriately be considered in passing upon the lawfulness of rates" and that due consideration must be given to other objectives of the National Transportation Policy as declared in the Act. Those objectives, among other things, the Commission pointed out, are the provision of "fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each, to promote safe, adequate, economical, and efficient service, and foster sound economic conditions in transportation and among the several carriers, all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of

the commerce of the United States, of the Postal Service, and of the national defense." (R. 37).

Among the factors which the Commission noted in its overall consideration of the lawfulness of the proposed TOFC rates in the light of the National Transportation Policy has been the serious decline of coastwise shipping since the outset of World War II. It pointed out that:

"... where there were 19 companies with 139 vessels operating in the Atlantic-Gulf coastwise trade prior to World War II, today only two deep-water common carriers are operating in that trade with seven vessels, three by Pan-Atlantic and four by Seatrain. And where approximately 8.5 million tons annually were transported in the Atlantic-Gulf coastwise trade prior to the war, the present capacity of the remaining vessels in that trade is only 1.8 million tons. In 1959, Pan-Atlantic's total tonnage, coastwise and Puerto Rican trades, approximated 600,000 tons, as compared with over 1,000,000 tons coastwise alone in 1941. At the outset of World War II, all of the vessels employed in the deep-water coastwise trade were taken over by the Federal government for national defense." (R. 38).

The Commission further found that the "importance of coastwise shipping for national defense purposes has been emphasized repeatedly from various governmental sources." (R. 38-39). The Commission also concluded that "coastwise shipping is important also for general public use as an integral part of the national transportation system," citing the economic dependency of ports and coastal areas upon the availability of water transportation. (R. 39). It further found that "[s]hipper evidence on these records is indicative of a need by the general public for the services of those lines [i.e., water carriers], and that they represent

an important and essential part of a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense." (R. 41).

The Commission adopted the position of the water carriers that the proposed TOFC rates would precipitate a cycle of destructive and vicious rate cutting (R. 39) and found that the "reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence of the coastwise water carrier industry generally." (R. 38).

The Commission found that the proposed TOFC rates were limited to those points in competition with water carriers and were not applied to those areas where the primary competition to the railroads was a mode of transportation other than water carriers. (R. 19).

Under these circumstances, the Commission concluded that "we are of the opinion that the objectives of the national transportation policy require the establishment and maintenance of a differential relationship between the rates under investigation on Sea-Land and Seatrain service, on the one hand, and the rates of the rail carriers, on the other, which will allow these water carriers operating in the coastwise trade to maintain rates that will enable them to continue efficient and economical coastwise service." (R. 41).

On February 2, 1961, appellee railroads brought an action in the District Court below to enjoin and set aside that part of the Commission's order which required the cancellation of the TOFC rates. Seatrain and Sea-Land intervened in defense of the order. The District Court set aside the order of the Commission and enjoined it from cancelling TOFC rates which returned at least fully dis-

tributed costs, holding that the Commission had improperly held up the TOFC rate level to protect the traffic of another mode of transportation in violation of Section 15a(3) of the Act. According to the District Court such rate differentials cannot be maintained unless the water carriers will be destroyed as a result of the rail carriers "setting rates so low as to be hurtful to [themselves] as well as [their] competitor or so low as to deprive the competitor of the 'inherent advantage' of being the low cost carrier". (R. 251-252). It is only these cost factors, and no others, the District Court holds, that the Commission may look at under Section 15a(3) in heeding the Congressional mandate to give "due consideration to the objectives of the national transportation policy declared in this Act."

Summary of Argument.

The decision of the District Court nullifies the National Transportation Policy and for all intents and purposes expunges this overriding Congressional declaration of policy from the Interstate Commerce Act. It does so by erroneously concluding that Section 15a(3), as added to the Act in 1958, has effected a major modification of the National Transportation Policy by making the cost of providing the service the controlling determinant as to the reasonableness of competitive rate reductions. Such a conclusion excludes such other important National Transportation Policy factors as the provision for fair and impartial regulation of all modes of transportation subject to the Act, so as to preserve the inherent advantages of each mode, the promotion of safe, adequate, economical and efficient service, the fostering of sound economic conditions in transportation and among the several

carriers, the establishment and maintenance of reasonable rates without unfair or destructive competitive practices—*all to the end of developing, coordinating, and preserving a national system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.*

The importance of this case to the coastwise water carriers cannot be stressed too strongly. If the decision of the District Court is permitted to stand, coastwise water service, already the victim of a drastic traffic decline, will be eliminated from the national transportation system.

For over forty years the law has recognized the economic need to control selective rail rate reductions aimed at water carriers. The Transportation Act of 1920 stated the intent of Congress that water transportation be fostered along with rail transportation. (Transportation Act of 1920, §500, 41 Stat. 499 [now Interstate Commerce Act, 49 U. S. C. §142 (1958)]).

The Transportation Act of 1940, 54 Stat. 898, reaffirmed the Congressional condemnation of selective rate reductions aimed at water carriers and expanded the Commission's duty to prevent destructive competition. *Eastern-Central Motor Carriers Association v. United States*, 321 U. S. 194, 206 (1944); *Interstate Commerce Commission v. A. L. Mechling*, 330 U. S. 567 (1947). It "was recognized in the debates on the bill that became the Transportation Act of 1940 that manipulation of rail rates downward might deprive water carriers of their 'inherent advantages' and therefore violate the Act. It was emphasized that one of the evils to be remedied was cutthroat competition, whereby strong rail carriers would reduce their rates, putting water carriers out of business." *Dixie Carriers, Inc. v. United States*, 351 U. S. 56, 59-60 (1956).

The contention that costs are the controlling factor in rate making has been consistently rejected by the Commission and this Court. *Alabama Great Southern R. R. v. United States*, 340 U. S. 216, 223 (1951). And the right of the Commission to condemn rates as destructive of a sound national transportation system, even though compensatory, has been upheld by this Court in *New York v. United States*, 331 U. S. 284 (1947). It was against this back-drop of long historical precedents and sound economic transportation policy that Section 15a(3) was enacted in 1958.

Section 15a(3) was the culmination of a long controversy which began in 1955. From that time until 1958 the question of whether continued regulation among the different forms of transportation was still required was subjected to intensive study by the Congress. Certain railroads urged that there should be a fundamental reversal of the National Transportation Policy so as to permit each form of transportation to make rates as it pleased, subject only to a requirement that the rates not be below the cost of carrying the traffic. On the other hand, the Interstate Commerce Commission, along with other forms of transportation, urged that long standing experience had established the need for continued regulation and that to permit unrestrained rate cutting would lead to the destruction of the national transportation system and the elimination of carriers whose financial resources would not permit their survival in the face of intensive rate wars.

The issue crystalized around a proposal submitted to the Congress by the Association of American Railroads and which was commonly referred to as the three "shall nots" because it would have prohibited the Commission, in determining the lawfulness of proposed rates, from considering (1) the effect of such rates on the traffic of any other mode of transportation; (2) the relation of such rates to the rates

of any other mode of transportation; and (3) whether such rates are lower than necessary to meet the competition of any other mode of transportation. H. R. 6141, 84th Cong., 1st Sess. §8 (1955).

This revolutionary change in rate regulation did not pass. Nothing like it passed. Not only did Section 15a(3) not change the National Transportation Policy, but it wrote that policy right into the rate making sections of the Act by charging the Commission to give "due consideration to the objectives of the national transportation policy declared in this Act." And the statute does not limit such "due consideration" to a single factor such as costs, as the District Court holds, but encompasses all the objectives of the National Transportation Policy.

Moreover, Section 15a(3), did not, as the District Court seems to suggest by its repeated use of the term "differential prohibition", contemplate a prohibition against rate differentials between rail and water service. Clearly, Section 307(d) of the Act gives the Commission the authority to prescribe such differentials in establishing through routes and joint rates for water and rail carriers. Section 305(c) also manifests a Congressional purpose to give water carriers the protection of rate differentials. Nothing in Section 15a(3) detracts from that Congressional purpose.

The only reason any legislation was enacted in 1958 was to silence the contention that, in exercising its powers, the Commission had gone beyond the public interest considerations and rate making standards contained in the Act and was arbitrarily holding up rate levels of established low-cost carriers solely to protect the traffic and rate structure of the higher cost mode of transportation, without regard to service disabilities, the competitive positions of the carriers or the impact of such rates upon the national transpor-

tation system. While the Commission denied that it had engaged in such umbrella rate making practices, neither it nor any one else had any fundamental objection to a statute restating and reaffirming the Commission's existing authority. This is all that Section 15a(3) was intended to do, and this is all it does.

The effect of the District Court's decision is to read into Section 15a(3) the railroad's three "shall nots" proposal which was completely rejected by the Congress.

The alleged arbitrary rate practices which Section 15a(3) was designed to preclude are not involved in this case. On the contrary, the Commission found that sea-land costs were generally lower than the railroad TOFC costs, that the service of the water carriers was inferior to TOFC service and required a rate differential to attract the traffic, that the proposed TOFC rates would cause a cyclical rate war, resulting in the elimination of the coastwise water service—all to the detriment of the national defense and the shipping public.

I.

Section 15a(3) did not alter the National Transportation Policy and make costs of providing the service the exclusive test for determining the lawfulness of competitive rates.

A. The Law Has Long Recognized the Need to Protect Water Carriers from Destructive Rail Competition and Selective Rail Rate Cutting.

The economic need for protecting water carriers has long been recognized by the law and forms a cornerstone of the National Transportation Policy. It is a need born of experience and the facts of transportation life. Ocean trans-

portation of goods from place to place has no service characteristics which are superior, or even equal, to those of either rail or motor carrier services. The latter services are quicker, more convenient, more flexible, better fitted to production and distribution schedules of manufacturers, involve fewer difficulties and hazards, and have greater availability in point of time and place, than ocean carrier services. Consequently, the ocean carrier industry has but one economic justification for existence, namely, the fact that it provides shippers in the general proximity of coastal areas with a lower cost form of transportation.

The device employed by the railroads to neutralize that advantage is the publication of selective rate reductions—selective in that the railroads maintain much higher rates to and from interior points where they do not face water competition. Such selective rail rate reductions will lead, as the Commission found here, to a cycle of competitive rate reductions resulting in the unnecessary dissipation of the revenues of all the carriers involved, and ultimately to the destruction of the water carriers' services.

It should be observed that upon the elimination of water competition, the excuse for reduced rail rates is gone, and all shippers will then be required to pay the higher normal rail rates. This is one of the principal reasons why port cities have so vigorously championed the cause of the water carrier services. See *War Shipping Administration T. A. Application*, 260 I. C. C. 589, 592-593 (1945); *Hearings on Decline of Coastwise and Intercoastal Shipping Industry Before the Senate Interstate & Foreign Commerce Committee*, 86th Cong., 2d Sess., 83-86 (1960).

Since at least 1910, Congress has legislated to protect the water carrier against destructive rail competition and selective railroad rate cutting. In that year, Section 4(1)

of the Interstate Commerce Act was amended so as to require prior Commission approval before the railroads could charge lower rates for longer hauls. Section 4(2) was added to provide that whenever a railroad reduced its rates at competitive points to meet water competition, it could not again increase them until the Commission found "that such proposed increase rests upon changed conditions other than the elimination of water competition." That paragraph was "designed to prevent the railroads from killing water competition by making excessively low rates;" its "specific purpose . . . is to ensure and preserve water competition; to prevent competition that kills." *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 567-568 (1919).

The Transportation Act of 1920 stated the intent of Congress that water transportation be fostered along with rail transportation as follows:

" . . . It is declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation" Transportation Act of 1920, §500, 41 Stat. 499 (now Interstate Commerce Act, 49 U. S. C. §142 (1958)).

Under the 1920 Act, the Commission was empowered to fix minimum rates so as to keep in competitive balance the various types of carriers and to prevent rail carriers from destroying their water competition. Thus, H. R. 456, 66th Cong., 1st Sess. (1919), accompanying the Transportation Act of 1920, stated the purpose of giving the Commission this power to be as follows:

" . . . With this power the Commission could prevent a rail carrier from reducing a rate out of

proportion to the cost of service, by establishing a minimum, below which such carrier could not fix its rate. *It would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its water competitor.* Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of rates as to make it impossible for the water carrier to survive. When once competition was thus driven off the rail rates would be restored or would rise to even higher levels. * * * (at p. 19) [Emphasis supplied].

These objectives of the 1920 Act have been recognized by this Court on numerous occasions. Thus, in *New York v. United States*, p. 13 *supra*, this Court, after discussing several cases in which the Commission had been upheld in taking action "to prevent destructive competition between rail, water and motor carriers," stated its approval of such action as follows:

"These cases, to be sure, recognize the power of the Commission so to fix minimum rates as to keep in competitive balance the various types of carriers and to prevent ruinous rate wars between them. That plainly is one of the objectives of the Act, and one of the reasons why the Commission was granted the power to fix minimum rates by the Transportation Act of 1920." (at 346).

The Transportation Act of 1920 also amended Section 4 of the Act to require that the Commission grant Fourth Section relief only if the reduced rates were "reasonably compensatory". (41 Stat. 456). In the *Transcontinental Cases of 1922*, 74 I. C. C. 48, 71 (1922), the Commission pointed out that these provisions of the 1920 Act were

intended to require, among other things, that rates requiring Fourth Section relief "be no lower than necessary to meet existing competition" and "not be so low as to threaten the extinction of legitimate competition by water carriers." The Commission further stated that "it clearly would defeat the intent of Congress to foster transportation by rail and water in full vigor if the rail carriers were permitted, at practically little or no profit to themselves, to operate so as to deprive water carriers of traffic which the water carriers would naturally handle."

The Transportation Act of 1940, 54 Stat. 898 (1940), reaffirmed the Congressional condemnation of selective rate reductions by rail carriers aimed at water carriers and expanded the Commission's duty to prevent destructive competition. This Court described the function of the Commission, in one of its first major discussions of the 1940 Act, as follows:

"But with the evolution of other forms of carriage, particularly motor carriage, and the Commission's acquisition of control over their rates and operations, a new situation arose. The Commission's task no longer was merely the regulation of a single form of transport, to secure reasonable and non-discriminatory rates and service. It became, not merely the regulator, but to some extent the coordinator of different modes of transportation. With the addition of motor and water carriage to its previous jurisdiction over rails, it was charged not only with seeing that the rates and services of each are reasonable and not unduly discriminatory, but that they are coordinated in accordance with the national transportation policy, as declared by the later legislation. This, while intended to secure the lowest rates consistent with adequate and efficient service and to preserve within the limits of the policy the

inherent advantages of each mode of transportation, at the same time was designed to eliminate destructive competition not only within each form but also between or among the different forms of carriage." [Footnote omitted]. *Eastern-Central Motor Carriers Ass'n. v. United States*, 321 U. S. 194, 205-206 (1944).

The Transportation Act of 1940 also recognized the need of water carriers for differentially lower rates as a protective device against the destructive rate practices of the railroads. As this Court said in the *Mechling* case:

"... But the congressional debates and committee reports on the 1940 Act and the statutory provisions which emerged from this legislative background show that Congress enunciated positive policies and specific limiting standards which it expected the Commission to follow in fixing rates, including 'differentials' between all-rail and water-rail rates. The provisions of the Transportation Act of 1940 which brought water carriers under Interstate Commerce Commission jurisdiction were vigorously opposed in Congress by those who feared that the Commission might raise barge rates in order to enable railroads better to compete with inherently cheaper water transportation. These opponents were repeatedly assured by sponsors of the 1940 Act who advocated Commission regulation of water transportation that the questioned legislation unequivocally required the Commission to fix rates which would preserve for shippers the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore service . . ." 330 U. S. at 574.

The Act of 1940 also contains a number of other provisions, e.g., §305(c), 54 Stat. 935 (1940), 49 U. S. C. §905(c)

(1958); §307(f), 54 Stat. 938 (1940), 49 U. S. C. §907(f) (1958); and §3(4), 54 Stat. 903 (1940), 49 U. S. C. §3(4) (1958), the prime purpose of which, as this Court in the *Meckling* case states, "is to protect the water carriers' natural advantages." (330 U. S. at 576).

And that Act expressly provided in the case of a through route, where one of the carriers is a water carrier, for the prescription by the Commission of "such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water." Transportation Act of 1940, §307(d), 54 Stat. 937; 49 U. S. C. §907(d) (1958).

Again, this Court has emphasized in *Dixie Carriers, Inc. v. United States*, p. 12 *supra*, that "one of the evils to be remedied [by the Transportation Act of 1940] was cut-throat competition, whereby strong rail carriers would reduce their rates, putting water carriers out of business." (351 U. S. at 59).

Thus, for a period of well over forty years Congress has legislated, the Commission has executed and this Court has recognized a national transportation policy that has fostered a water carrier system with its inherent advantages and other public interest attributes, including that of its importance to the national defense, and has protected that system against selective rate cutting and destructive competition by the rail carriers. This fundamental and long standing policy was abolished, according to the decision of the District Court, in 1958 by the enactment of Section 15a(3). As we shall show in the subsequent portions of this brief, not only was this policy not abolished, but it was reaffirmed by the Congress in its enactment of the Transportation Act of 1958.

B. The Legislative History of Section 15a(3) Manifests a Clear Congressional Intent Not to Weaken the National Transportation Policy Nor Impair the Commission's Implementation of That Policy.

Section 15a(3) did not change the National Transportation Policy nor did it affect the Commission's power to consider the effect of rate reductions upon competitors. The legislative history of this section makes that point abundantly clear.

The legislative history of Section 15a(3) begins in 1955 with S. 1920 and H. R. 6141, 84th Cong., 1st Sess. The proposed legislation provided a new National Transportation Policy which eliminated any reference to "unfair or destructive competitive practices" and contained a completely new rate making rule to take the place of the existing Section 15a. The new Section 15a contained what is commonly referred to as the three "shall nots" because it forbade the Commission, in determining the validity of rates, to consider three important factors which the Commission had traditionally considered: "the effect of such charge on the traffic of any other mode of transportation; or the relation of such charge to the charge of any other mode of transportation; or whether such charge is lower than necessary to meet the competition of any other mode of transportation". H. R. 6141, 84th Cong., 1st Sess. §8 (1955). A storm of opposition arose against H. R. 6141, centering around the three "shall nots," and Congress eventually rejected completely that proposed rule.

Following the introduction of H. R. 6141, the Subcommittee on Transportation and Communication of the House Committee on Interstate and Foreign Commerce (hereinafter referred to as the "House Subcommittee") held extensive hearings in 1956. (*Hearings Before the Subcommittee on Transportation Policy of the House Commit-*

tee on Interstate and Foreign Commerce, 84th Cong. 2d Sess.) [hereinafter cited as *1956 Hearings*.] At the outset of the hearings, the Interstate Commerce Commission recommended against the adoption of the three "shall nots". (*1956 Hearings* 270). Water carrier witnesses also opposed the three "shall nots" rule.

The railroads vigorously endorsed the new legislation. Their chief spokesman, Jervis Langdon, Jr., testified that the railroads regarded the three "shall nots" rule as the basic recommendation of the new legislation and that enactment of that rule would eliminate the need for amending the National Transportation Policy so as to delete the reference to destructive competition. (*Id.* at 537-548). Mr. Langdon concluded that the revised rule of ratemaking contained in H. R. 6141 could be boiled down to simply the three "shall nots". Accordingly, he proposed that there be added to the existing Section 15a a new paragraph (3), reading as follows (*Id.* at 548):

"(3) In the exercise of its power to prescribe just and reasonable rates, the Commission shall not consider the effect of such rates on the traffic of any other mode of transportation; or the relation of such rates to the rates of any other mode of transportation; or whether such rates are lower than necessary to meet the competition of any other mode of transportation".

The Commission in response to the position of the railroads recommended strongly against the adoption of the three "shall nots." In a letter to the Chairman of the House Committee, dated July 20, 1956, the Commission outlined its position as follows:

"If the three 'shall nots' were inserted in the rule of ratemaking of Section 15a, the Commission would

be limited to one test in determining the reasonableness of a rate—whether the rate is compensatory. We are convinced that this would be highly impracticable and inimical to the maintenance of a sound transportation system.” (*Id.* at 1767-1771).

The Commission made quite clear what the consequences of the railroad proposal would be—“To put it bluntly, the proposed amendment to Section 15a would, in many instances, enable railroads to drive other forms of transportation out of business. In transportation, as in any other business, with the disappearance of competitors the rates of the victors in such a struggle would not long remain on the depressed competitive levels.”

The Commission concluded:

“We therefore respectfully submit that neither the Nation’s balanced, efficient and progressive transportation system, nor the national economy, should be subjected to the disturbances and ultimate damage which would result from enactment of certain provisions of H. R. 6141 or the substitute proposal in the form of the three ‘shall nots’ as suggested by the Association of American Railroads.” (*Id.* at 1771).

This strong attack on the railroads’ proposal must be compared with the Commission’s acquiescence in the proposal which was finally enacted as 15a(3).

H. R. 6141 died in Committee. In the 85th Congress, 1st Sess., the railroad “short form” version of the three “shall nots” was introduced as H. R. 5523 and 5524. Hearings were held by the House Subcommittee in April 1957. At the hearings the Commission reaffirmed its strong opposition to the three “shall nots.” (*Hearings Before the House Subcommittee on Transportation Policy of the House*

Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., 46, 53-59 (1957)).

The scene shifted to the Senate in 1958. From January through April 1958, the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce (hereinafter called the Senate Subcommittee), under the Chairmanship of Senator Smathers, took 2,355 pages of testimony on the "Problems of the Railroads." These covered not only the bitterly contested three "shall nots," but constructive proposals for legislation to ease the railroads' tax burden, provide for equipment loan guarantees, and other problems which the railroads were then encountering. As far as the rate making rule went, the testimony was largely a repetition of what had gone before.

Nevertheless, on April 30, 1958, the Senate Subcommittee recommended to the full Committee a new Section 15a(3), which contained language in part similar to that of the three "shall nots":

"In a proceeding involving competition with another mode of transportation, the Commission, in determining whether a rail rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by railroad *and not by such other mode.*" [Emphasis supplied].

However, the Senate Subcommittee intended something less than the three "shall nots", for its Report stated:

"The subject of competitive ratemaking as between the different forms of transportation was discussed at length during the hearings, the railroads urging enactment of legislation that would restrict substantially the authority of the Interstate Commerce Commission in this field. *The subcommittee*

is not convinced that the record before it justifies approval of the railroads' proposal." [Emphasis supplied].

"... The subcommittee believes and the national transportation policy is clear, however, that such rate-making should be regulated by the Commission to prevent unfair destructive practices on the part of any carrier or group of carriers."

"It nevertheless appears that the Interstate Commerce Commission has not been consistent in the past in allowing one or another of the several modes of transportation to assert their inherent advantages in the making of rates. The subcommittee recommends, therefore, that the Commission consistently follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of service or of cost. In 1945 in *New Automobiles in Interstate Commerce* (259 ICC 475), the subcommittee believes that the Commission properly construed the intent of Congress in this respect when it said:

As Congress enacted separately stated ratemaking rules for each transport agency, it obviously intended that the rates of each such agency should be determined by us in each case according to the facts and circumstances attending the movement of the traffic by that agency. In other words, there appears no warrant for believing that rail rates, for example, should be held up to a particular level to preserve a motor-rate structure, or vice versa (259 ICC at p. 538).

"The subcommittee wishes to affirm the interpretation of the Commission given in the *Automobile* case epitomized in the words quoted above. The subcommittee therefore believes it necessary to amend the act only so as, in effect, to admonish the Commission to be consistent in following the policy enunciated in

the *Automobile* case thus assuring reasonable freedom in the making of competitive rates * * *." Report of the Subcommittee on Surface Transportation, Annexed to S. Rep. No. 1647, 85th Cong., 2d Sess. at 18 (1958).

On May 8, 1958, Senator Smathers introduced S. 3778 which embodied in Section 5 the Subcommittee proposal, as well as other amendments to the Act unrelated to competitive ratemaking. The entire Bill was called the "Transportation Act of 1958." (See *Hearings on S. 3778 Before the Senate Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. 1 (1958)) [hereinafter cited as *1958 Senate Hearings*].

Additional hearings were held by the full Committee on this proposal on May 20 and 21, 1958 because, as Senator Smathers said, "in the light of the language, there have been some who have felt that it would work an injustice to them or injury to them" (1958 *Senate Hearings* 6).

In its statement to the full Committee, the Commission pointed out that the proposed language that the Commission shall not "consider the facts and circumstances attending the movement of the traffic . . . by such other mode", was in conflict with the statement in the Subcommittee Report that the Subcommittee desired "the Commission to prevent unfair destructive practices on the part of any carrier or group of carriers". (*Id.* at 167).^{*} The Commission added that the proposal "would be inconsistent with the controlling objectives of the national transportation policy, quoted above, which would remain unchanged" and "would enable the railroads to contend that it is

* In reply to similar contentions made on behalf of Seatrain and Sea-Land, that the language of the Subcommittee's proposal was inconsistent with its report, Senator Smathers stated that the Subcommittee's intent was only to reaffirm the national transportation policy—"we feel it necessary to reemphasize the importance of the national transportation policy . . . That is all we are seeking to do." (1958 *Senate Hearings* 18, 21, 23-24, 29, 32, 70, 85).

intended to give to them complete freedom, in the presence of competition from another mode of transportation, to establish rates which merely cover out-of-pocket costs."

The Commission further noted that all were in accord "with the proposition that rates of a low-cost carrier should not be held up to a particular level to protect the traffic of other carriers;" that the Commission believed it had so applied the law, and if all that was in dispute was whether it had done so, the Commission suggested "that the fears of the railroads might be allayed and the expressed views of the Subcommittee incorporated in the statute by substituting for the proposed paragraph (3) of Section 5 of S.3778 language substantially as follows:

"(3) In a proceeding involving competition between carriers, the Commission, in determining whether a proposed rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic. Rates of a carrier shall not be held up to a particular level to protect the traffic of a less economic carrier, giving due consideration to the inherent cost and service advantages of the respective carriers." (Id. at 102).

This new approach was seized upon by the Committee, and the re-drafting of the Subcommittee's proposed new Section 15a(3) (p. 23 *supra*) began at once, along the lines suggested by the Commission (1965 *Senate Hearings* 177-178).

"Senator Potter. Why don't we put in the amendment to conform with the national transportation policy, strike out the part 'by any other mode'."

"Senator Smathers. The way I look at it if you strike that out, it is just like performing an operation—

"Senator Potter. Actually what we want the Commission to do is to conform to the transportation policy."

"Senator Smathers. That is right."

"Commissioner Freas. We will buy Senator Potter's suggestion."

"Senator Smathers. What I am saying is this: If we don't say 'and not by such other mode,' then you eliminate the inherent advantage, I think. I am afraid that is what has happened. If you strike out 'and not by such other mode,' then the Commission is less and less considering—the cases show less and less consideration here of the advantages of one mode as distinguished from another. They are becoming a giant handicapper more and more, in their desire to do a good job, I mean."

"Senator Potter. I agree that they shouldn't do that, but actually what we want the Commission to do is to carry out the transportation policy. That is what we're trying to say here. Isn't that right?"

"Commissioner Freas. That is right."

"Senator Potter. We have a vote."

It was at this point, too, that Commissioner Freas pointed out that in the *New Automobiles* case, the Commission "did consider the facts and circumstances surrounding the movement by all the modes that were involved there." (*Id.* at 177).

The final legislation is obviously based on the Commission's proposal and the suggestion of Senator Potter: "Why don't we put in the amendment to conform with the national transportation policy, strike out the part, 'by any other mode.'" (*Id.*) Indeed, Senator Potter's second suggestion went even further than the Commission's proposal and both of his suggestions were included verba-

tim in the bill. They were plainly the direct opposites of the three "shall nots."[•]

The railroads took violent exception, even to the Commission's proposal without the reference to the National Transportation Policy. They wrote the Committee on May 23, 1958, that "the proposal is altogether unacceptable to the railroads." (*Id.* at 186). On June 3, the Senate Committee reported the "Transportation Act of 1958," which included in Section 5 the amendment to Section 15a(3) of the Act as finally adopted (S. Rep. No. 1647, 85th Cong., 2d Sess. (1958)). Section 15a(3), as finally adopted provides as follows:

"In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, *giving due consideration to the objectives of the national transportation policy declared in this Act.*" (Emphasis supplied)

The Committee pointed out that it had changed the proposal submitted by its Subcommittee but agreed with the Subcommittee's comments with respect to the *New Automobiles* case, and said:

"The committee wishes further to emphasize that the amendment in regard to section 5 amending

[•] In the later debate on the bill, Senator Potter pointed out the significance of the inclusion of his second suggestion: "Representatives of each mode of transportation testified before the committee that they would be perfectly happy to have their rate sections considered according to the national transportation policy. So in determining a rate, whether it be the rate for trucks, barge lines, or railroads, we stated that it had to be consistent with the national transportation policy." 104 Cong. Rec. 10860 (1958).

section 15a of the act as framed by the committee is designed to encourage competition in transportation by allowing each form of transportation subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to offer, with such ratemaking being regulated by the Interstate Commerce Commission, however, to prevent 'unfair or destructive competitive practices' *as contemplated by the declaration of national transportation policy*. Under the committee amendment the principal emphasis, *but not the exclusive emphasis*, in a competitive ratemaking proceeding involving different modes of transportation will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies." [Emphasis supplied]. S. Rep. No. 1647 at 3.

Meanwhile, on May 19, 1958, the House Subcommittee had resumed hearings on the "Railroad Problems"; and in particular with respect to H. R. 12488, which was identical to the proposal of the Senate Subcommittee as originally embodied in S. 3778. At the conclusion of these House hearings, the revisions made by the full Senate Committee in S. 3778 became known. The House Subcommittee then asked the carriers for comment on the revised bill.

On May 27, 1958, the railroads, in reply, gave up their fight for the three "shall nots" and grudgingly stated: "In general, it may be said that this proposal [S. 3778 as revised] does not give us the full measure of relief we sought in the making of competitive rates but clearly it does permit the forces of competition to play a stronger part in rate-making than heretofore." *Hearings Before the Subcommittee on Transportation Policy of the House Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. at 480 (1958) [hereinafter cited as *1958 House Hearings*].

The motor carriers advised the House Subcommittee that they had no objections to the bill because: "To the

extent that the writing into statutory form of the present policy of the I.C.C. may once and for all put an end to the continuous complaint of the railroads, that a so-called umbrella is being held over the rates of rail competitors, the trucking industry does not oppose this specific proposal." (1958 House Hearings 480-481).

The Chairman of the House Committee on Interstate and Foreign Commerce, Congressman Harris, then included the revised Senate Committee version of Section 15a(3) as part of H. R. 12832 (introduced June 5, 1958—104 Cong. Rec. 10345). The bill was reported to the House on June 18, 1958 (H. R. Rep. No. 1922, 85th Cong., 2d Sess.). The Report pointed out (at 13-15):

"The committee believes that each mode of transportation should have opportunity to make rates reflecting the different inherent advantages each has to offer so that the public may exercise its choice among them, cost and service both considered, in the light of the kind of transportation desired. The committee believes, however, and the national transportation policy is clear, that such ratemaking should be regulated by the Commission to prevent unfair destructive practices on the part of any carrier or group of carriers."

"The committee believes that the Commission consistently should follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of cost or service, *giving due consideration to the objectives of the national transportation policy declared in the Interstate Commerce Act.*" [The Report then quotes the statement of National Transportation Policy in the Act]. (Emphasis supplied)

"The committee feels, accordingly, that an amendment to the rule of ratemaking is desirable to

serve as a guide to the Commission in achieving consistency in its treatment of competitive rate cases.”

“The committee is of the opinion that the effect of this amendment will be to encourage competition between the different modes of transportation for the benefit of the shipping public. It understands that the amendment, while not having the full endorsement of all of the modes of transportation, at least is not unacceptable to any of them.”

S. 3778 was finally enacted into law on August 12, 1958. In the light of this legislation's evolution from a railroad sponsored bill designed to eliminate the Commission's control over rates to a Congressional admonition to the Commission to be consistent in its ratemaking decisions in following the *New Automobiles* case, it can scarcely be contended that Section 15a(3) made any significant change in the National Transportation Policy.

Surely the foregoing legislative history denotes no intention to abandon an overriding National Transportation Policy, which this Court has held “is to govern the Commission in the administration and enforcement of all provisions of the Act” and “is the yardstick by which the correctness of the Commission's actions will be measured”. *Schaffer Transportation Co. v. United States*, 355 U. S. 83, 88 (1957). In fact Congress took the unusual but significant step of writing the National Transportation Policy into Section 15a(3) by a direct command to the Commission to give due consideration to that policy in its determinations under that section.

C. The District Court Erred in Making Costs the Controlling Determinant as to The Lawfulness of Competitive Rates, to the Exclusion of Other National Transportation Policy Considerations.

The decision of the District Court exalts the cost of furnishing the service to a position of such preeminence that

it becomes the controlling, and well-nigh exclusive, factor to be considered in determining the lawfulness of competitive rates. For the District Court holds that rate differentials between rail and water services can only be maintained when rates are set "so low as to be hurtful to the proponent as well as his competitor or so low as to deprive the competitor of the 'inherent advantage' of being the low-cost carriers." (R. 251-252). Both the Commission and this Court have consistently rejected the proposition that costs are the controlling factor in rate making. *New York v. United States*, 331 U. S. 284, 331 (1947); *Alabama Great Southern R. R. v. United States*, 340 U. S. 216, 223 (1951).^{*} In the latter case the Commission had *prescribed* reasonable differentials between all-rail rates and rail-water rates without proof of lower costs of the rail-water service, and the railroads contended that, without such proof, the inferiority of service alone did not authorize the Commission to prescribe lower rail-water rates. (*Id.* at 221). The Supreme Court found this argument "not persuasive" because:

"Admittedly, barge service is worth less than rail service. It is slower, requires more handling and entails more risk. A shipper will pay only what the service is worth to him. The shippers' evidence, the Commission found, indicated a fairly unanimous view that the principal worth to them of shipping by barge was the saving in transportation expense which it offered. The Commission is not bound to require a rate as high for the inferior as for the superior service. To do so would certainly destroy the principal worth of the inferior service and send all freight to the railroads; practically, there would be no competition between the different modes of transportation.

^{*} In the *Alabama* case at 223 fn. 4, this Court lists the cases which reject the "exclusive cost theory."

"Neither the Commission nor this Court has held that lesser cost of service is a finding without which the Commission may not fix a charge, division of rate, or differential." (Footnote omitted.) (*Id.* at 223.)

The right of the Commission to condemn rates as destructive of a sound national transportation system, even though compensatory, has been upheld by this Court in *New York v. United States*, p. 34 *supra*. In the *New York* case, 331 U. S. at 345, the Court cites with approval *Scandrett v. United States*, 32 F. Supp. 995, 996 (1940), *aff'd* 312 U. S. 661 (1941), wherein the "Commission had found that proposed reduced rates were 'compensatory considering all costs' but that they were below a minimum reasonable level and therefore unlawful. It took that action to prevent destructive competition between rail, water, and motor carriers. The court sustained the order."

Nowhere does Section 15a(3) state that costs are to be the controlling factor in judging the reasonableness of rates. Costs are not even expressly mentioned. The section does, however, expressly require the Commission to give "due consideration to the objectives of the national transportation policy declared in this Act." Nor is such consideration to be confined to a single objective, such as the cost factor; the Congressional mandate is directed to all the objectives of the National Transportation Policy.

Discounted by the District Court decision were such important National Transportation Policy factors as the competitive impact of the TOFC rates upon the water carriers, the fostering of sound economic conditions in transportation and among the several carriers, the development, co-ordination and preservation of a national transportation system by water, highway and rail and the commercial and national defense needs for water service.

Despite the holdings of this Court in such cases as *Interstate Commerce Commission v. A. L. Mechling*, p. 12 *supra*, *New York v. United States*, p. 34 *supra* and *Alabama Great Southern R. R. v. United States*, p. 13 *supra*, on the need for evaluating the impact of rate reductions on competitive modes and the clear rejection by Congress of the railroad espoused proposals to disregard the effect of such rate reductions upon other modes, as demonstrated by the legislative history of Section 15a(3), the District Court considers the adverse effect of rate competition on other modes as unimportant and irrelevant, even if that effect is to destroy the other mode. (R. 251).

Whereas, the Commission in the exercise of its duties to "foster sound economic conditions in transportation and among the carriers" found that the proposed TOFC rates would precipitate a cyclical rate war (R. 39), the District Court rejects this finding as a basis for acting under Section 15a(3) with a suggestion that the Commission can disapprove non-compensatory rates under Section 15(1). (R. 257). But the National Transportation Policy clearly prohibits ruinous rate wars. The *New York* decision and Section 15a(3) just as clearly require the Commission to heed that policy in passing upon the lawfulness of rates. Thus, the Commission was entirely correct in taking this issue into consideration in its rejection of the proposed TOFC rates.

While the Commission, in the exercise of its duty to preserve water service under the National Transportation Policy, found that the proposed TOFC rates were an initial step in an overall program of rate reductions that would threaten the existence of the coastwise water carrier industry, the District Court erroneously views such findings as unimportant in the light of its belief that the adverse effect

of rates on competitors is not a factor to be considered under Section 15a(3).

The Commission, in passing upon the proposed TOFC rates and their destructive effect upon the water carriers, properly considered the national defense importance of water service. This, the District Court states, was erroneous since "national defense is not stated as an operative policy or means: it is mentioned only as the hoped-for 'end' of the National Transportation Policy." (R. 256).

The District Court's relegation of national defense to a "hoped-for end" rather than an operative policy factor to be considered by the Commission runs counter to the National Transportation Policy. As another district court stated in *Cantlay & Tonzola v. United States*, 115 F. Supp. 72, 80 (S. D. Cal. C. D. 1953), in holding that the Commission was required to consider the national defense factor, all "relevant factors of the National Transportation Policy must be at least considered by the Commission in every proceeding." The downgrading of the national defense factor by the District Court is also inconsistent with the national defense requirements of other transportation statutes.

In the Merchant Marine Act of 1920 the Congress stated:

"That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine . . ." 41 Stat. 988, 46 U. S. C. §861 (1958).

Section 101 of the Merchant Marine Act of 1936 reads as follows:

It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times; (b) capable of serving as a naval and military auxiliary in time of war or national emergency; (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable; and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine." [Emphasis supplied.] (49 Stat. 1985, 46 U. S. C. §1101 (1958)).

Section 102 of the Federal Aviation Act of 1958 provides as follows:

"In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." (72 Stat. 740, 49 U. S. C. §1302 (1958)).

Thus it is clear that national defense is an important factor to be considered by all of the transportation regulatory agencies in administering their respective statutes. The Interstate Commerce Commission is no exception.

In conclusion, it should be pointed out that the *New Automobiles* case, to which Section 15a(3) gives Congressional expression and approval, never made the cost of providing the service the exclusive determinant as to the lawfulness of a rate. There is no suggestion in that case that the Commission must close its eyes to the impact of a rate reduction on other carriers or the national transportation system. The Commission, in fact, said quite the opposite:

"What constitutes a minimum reasonable rate is a matter to be determined in the light of the facts of record in each individual case, avoiding arbitrary action and keeping within statutory and constitutional limitations, just as in the case of maximum reasonable rates. Whether a rate is below a reasonable minimum depends on whether it yields a proper return; whether the carrier would be better off from a net-revenue standpoint with it than without it; *whether it represents competition that is unduly destructive to a reasonable rate structure and the carriers; and whether it otherwise conforms to the national transportation policy and the rules of the ratemaking declared in the act of 1940.*" [Emphasis supplied.] (259 I. C. C. at 534). —

What the Commission did in the *New Automobiles* case was to reject the "umbrella" rate concept, i.e., the arbitrary holding up of rate levels of proven low-cost carriers just to protect the higher cost mode's share of the business, without regard to the competitive positions of the carriers or the impact of the rates upon the national transportation system. No such arbitrary Commission rate practices are involved

in this case. Here, unlike *New Automobiles*, the proponent of the rate was not the proven low-cost carrier, but the high-cost carrier, insofar as TOFC service was concerned. Whereas, here, the Commission found that the proposed TOFC rates would cause a cyclical rate war, resulting in the elimination of coastwise service to the detriment of shippers and the national defense, no such findings were made in *New Automobiles*. On the contrary, the Commission there expressly stated as follows:

"There is no showing that the rate structures under consideration threaten the financial stability of the carriers . . ." (259 I. C. C. at 539).

The District Court's preoccupation with costs to the exclusion of the other objectives of the National Transportation Policy is clearly erroneous and contrary to over forty years of Congressional mandates, administrative interpretations and judicial precedents, including those of this Court.

D. Section 15a(3) Does Not Prohibit the Prescription of Rate Differentials Between Rail and Water Carriers.

On several occasions in its decision the District Court refers to Section 15a(3) as a "differential prohibition". That Section 15a(3) cannot be construed in this manner is clear. Such a construction runs counter to the National Transportation Policy, vitiates other sections of the Act and does not comport with the legislative history of Section 15a(3) itself.

The Transportation Act of 1940, 54 Stat. 898, contains many provisions recognizing the need of water carriers for differentially lower rates, in order to preserve their natural advantage of lower costs of service. *Interstate Commerce Commission v. A. L. Mechling*, p. 12 *supra* at 576.

This need was recognized, even in the absence of proof of lower costs of rail-water service *vis-a-vis* all-rail service, in *Alabama Great Southern Railroad Co. v. United States*, p. 13 *supra*.

Section 305(c) of the Act in providing that "Differences in . . . rates . . . and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination . . . or an unfair or destructive competitive practice . . ." clearly manifests Congressional approval of lower differentials in favor of water carriers. And Section 307(d) of the Act makes express provision for rate differentials as follows:

"In the case of ~~a~~ through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable ~~differentials~~ as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water."^{*}

Differentials reflecting the lower cost of water service are to be observed in the establishment of joint rates in order to preserve the inherent advantages of the water carriers. *Dixie Carriers v. United States*, p. 12 *supra*.

Clearly Section 15a(3) with its direction to give due consideration to the National Transportation Policy cannot be deemed to have repealed Sections 305(c) and 307(d) of the Act. When Congress passed Section 15a(3) it was very much aware of the foregoing sections of the Act. During the hearings before the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2nd Sess. on S. 3778, at a time when that bill proposed a new Section 15a(3) that

* Seatrain participates in through routes and joint rates with connecting rail carriers.

would have prevented the Commission from considering facts and circumstances attending the traffic of modes other than rail, the President of Seatrains expressed concern that the proposed amendment might deprive the water carriers of the protection of Section 307(d). Members of the Committee indicated no such intention, were informed by their counsel that Section 305(c) of the Act guarantees the right of water carriers to lower rates and expressed their belief that the National Transportation Policy would be controlling. (Sen. Hearings on S. 3778, 85th Cong., 2d Sess. at 29-31). Surely then, when S. 3778 was enacted in its final form as Section 15a(3) with the prohibition against considering the effect of rate reductions on other modes eliminated and the substitution in its place of a specifically expressed requirement that due consideration be given the National Transportation Policy, there cannot be the slightest doubt that the differentials contemplated by Section 305(c) and 307(d) of the Act were not abrogated by Section 15a(3). Thus the District Court's constant characterization of Section 15a(3) as a differential prohibition is erroneous.

Conclusion.

For all the foregoing reasons the judgment of the District Court should be reversed and the cause remanded to the District Court, with directions to dismiss the complaint.

Respectfully submitted,

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January 9, 1963.

APPENDIX.

Statutes Involved.

Transportation Act of 1940—Declaration of National Transportation Policy.

(54 Stat. 898, 899, 49 U. S. C. preceding
§§ 1, 301, 901 and 1001)

SECTION 1. The Act entitled "An Act to regulate commerce", approved February 4, 1887, as amended . . . is amended by inserting before Part I the following:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preference or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Sec. 15. Determination of Rates, Routes, Etc.

(7) [24 Stat. 384, 54 Stat. 911, as amended 49 U. S. C. §15(7)] Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons

in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Sec. 15a as Amended 49 U. S. C. §15a*

(1) [41 Stat. 488, 48 Stat. 220, 54 Stat. 912] When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) [41 Stat. 488, 48 Stat. 220, 54 Stat. 912] In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

(3) [72 Stat. 572] In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement

* Prior to 1958, section 15a was comprised of sections (1) and (2). The only change made by the 1958 amendment was the addition of section (3) (72 Stat. 572).

of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

Sec. 305. Rates, Fares, Etc.

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(c) [54 Stat. 934, 49 U. S. C. §905] It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided*, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

• • • • •

Sec. 307. Commission's Authority Over Rates, Etc.

(d) [54 Stat. 937, 49 U. S. C. §907] The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint

rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

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No. 108

In the Supreme Court of the United States

October Term, 1962

INTERSTATE COMMERCE COMMISSION, APPELLANT

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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Washington 25, D.C.

JANUARY 1963

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 108

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (R. 241-262) is reported at 199 F. Supp. 635. The report of the Interstate Commerce Commission (R. 4-69) is printed at 313 I.C.C. 23.

JURISDICTION

The judgment of the district court was entered on January 8, 1962 (R. 263-264). The Interstate Commerce Commission filed its notice of appeal on March 9, 1962 (R. 264-266), and probable jurisdiction was noted on October 8, 1962 (R. 274). The jurisdiction of this Court is conferred by 28 U.S.C. §§ 1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901 and 1001, and sections 15(7) and 15a of the Interstate Commerce Act, as amended, 49 U.S.C. §§ 15(7) and 15a are set forth in the Appendix, *infra*.

QUESTIONS PRESENTED

Appellee railroads proposed substantially reduced trailer-on-flatcar (TOFC) rates between certain points also served by coastwise water carriers. The water carrier out-of-pocket and fully-distributed costs of moving the traffic were in almost all instances below the out-of-pocket and fully-distributed costs, respectively, of the railroads' TOFC service. The reduced rail rates, which exceeded the railroads' out-of-pocket costs in all instances and their fully-distributed costs in some instances, were at the levels of the water carrier rates for the same movements but were substantially below the level maintained by the railroads for similar traffic elsewhere. The following questions are presented:

1. Whether, under sections 15(7) and 15a(3) of the Interstate Commerce Act and the National Transportation Policy, the Commission may reject as not shown to be just and reasonable the proposed railroad TOFC rates without finding, as the controlling consideration, that the competing coastwise water carriers are the low cost mode of transportation, where the Commission found that the coastwise water carriers' service cannot compete at equal rates with the railroads' service, that the reduced rail rates are part of a program of rail rate reductions which threaten the continued ex-

istence of the coastwise water carrier industry, and that coastwise shipping is important for national defense purposes and is needed by the public as an integral part of the national transportation system.

2. Whether the Commission must find that the water carriers are the "overall low-cost mode," as well as the low-cost mode with respect to the particular traffic involved, before it may reject a rail rate returning fully-distributed cost to protect the rate structure of the water carriers.

3. Whether, if the Commission must make such findings, it is in any event precluded from rejecting a rail rate for a particular movement which yields the railroads' fully-distributed cost which is lower than the fully-distributed cost of the competing water carrier for such movement.

STATEMENT

This case involves the validity of so much of an order of the Interstate Commerce Commission as directed the cancellation of some 66 substantially reduced commodity rates proposed by several railroads for their trailer-on-flatcar (TOFC) service between points in the East, on the one hand, and Dallas and Ft. Worth, Texas, on the other. The railroads' proposed rate reductions were limited to points served by the other deep-water common carriers now engaged in the Atlantic-Gulf coastwise trade, namely, Sealand Service, Inc. (referred to in the Commission's report by its former name of Pan-Atlantic Steamship Corporation) and Seatrain Lines, Inc.

1. Beginning in 1933, Sea-Land operated as a break-bulk¹ water carrier, except during the World War II years when all vessels employed in the deep-water coastal trade were requisitioned by the United States Government for national defense purposes. In 1957, Sea-Land suspended its Atlantic-Gulf coastwise break-bulk service and converted four vessels into crane-equipped trailerships, each capable of holding 226 demountable highway trailers. As a consequence, it became possible for Sea-Land to provide a motor-water-motor service in which freight is moved in demountable trailers from the consignors over highways by certificated motor carriers or by use of Sea-Land's own motor equipment to the ports, where the trailers are lifted onto Sea-Land ships for movement via water to the destination ports where the process is reversed. The conversion to the more efficient trailer-ship service has reduced Sea-Land's operating costs and has brought about a reduction in the cargo-handling time and the in-port vessel time.

In Seatrain's service, freight is transported to its dock at Edgewater, New Jersey, in railroad cars. The cars and their contents are then lifted onto Seatrain's vessels for the water leg of the journey to Atlantic and Gulf ports served by Seatrain. At destination, the reverse operation occurs and the cars are delivered by rail to the consignee. Thus, it is a rail-water-rail, non-break-bulk service which offers to

¹ Service of the break-bulk type involved the physical unloading of freight from rail car or truck and loading of the cargo into the ships and the reverse of this operation at destination.

the shipper the transportation of his lading in a rail car from consignor to consignee.²

Railroad TOFC service is a motor-rail-motor operation in which the shipment leaves the consignor in a motor carrier trailer and arrives at the door of the consignee in the same trailer, the laden trailer having been transported in the line haul on a railroad flatcar. While this type of operation has been engaged in sporadically since 1926, its principal growth has occurred in recent years, and the rail TOFC service between points in the southwest and points in the east was inaugurated in the summer of 1956.

Traditionally, water rates, including water-rail and water-motor rates, have been maintained at levels differentially lower than the corresponding all-rail rates, principally because of disadvantages in the water service due to perils of the sea, slower transit time, and infrequency of sailings.³ When Sea-Land inaugurated its new trailership service in 1957, it published rates which, in general, were 5 to 7½ percent lower than the corresponding all-rail boxcar rates, but were less than the differentials which had existed by reason of the rates formerly maintained for the break-bulk service.

2. By schedules filed to become effective on November 14, 1957, and later, the railroads proposed to es-

² Seatrain's operations have previously been before this Court in *United States v. Pennsylvania R. Co.*, 323 U.S. 612.

³ See *Class Rate Investigation*, 1939, 286 I.C.C. 5 (1952), the last major proceeding in which the rates of Atlantic-Gulf coastwise water carriers were considered, where the Commission prescribed reasonable maximum class rates on ocean-rail traffic designed to preserve the then-existing differentials of the ocean-rail rates under the all-rail rates.

establish the reduced TOFC rates at issue. Since the establishment of the reduced TOFC rates would leave higher rates in effect to and from intermediate points involving shorter hauls in violation of the long and short haul provisions of section 4(1) of the Act, 49 U.S.C. § 4(1),⁴ the railroads also applied to the Commission for the relief from those provisions which section 4(1) permits the Commission to authorize "in special cases." See *A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324. The proposed rates and the fourth section application were opposed by the Secretary of Agriculture, the Houston Port Bureau, the Port of New York Authority, the City of Providence, the New Orleans Traffic and Transportation Bureau, Sea-Land, Seatrains, and a motor carrier association. The rates were suspended and placed under investigation in the Commission's I. & S. Docket No. 6834, *Piggy-Back Rates—Between East and Texas*, which docket also embraced the fourth section application as well as certain effective Sea-Land and Seatrains rates between the same points the lawfulness of which is not at issue in this litigation. On December 19, 1960, the Commission issued its report⁵ and accompanying order.

⁴For example, the normal TOFC rate on candy from Boston to Dallas is 290 cents per 100 pounds and the distance over a direct rail route is 1,965 miles, while the normal TOFC rate from Boston to Bald Knob, Arkansas, a distance of 1,543 miles, is 236 cents per 100 pounds. Plaintiffs propose to reduce the rate from Boston to Dallas to 214 cents per 100 pounds while maintaining the rate of 236 cents per 100 pounds for the shorter haul to the Arkansas destination.

⁵This is a consolidated report embracing some 43 docket proceedings which were, in turn, consolidated into four dockets for

The Commission found that the proposed TOFC rates equal or exceed out-of-pocket costs for hauls of average circuitry for all listed movements by railroad-leased TTX cars and all but six of 66 listed movements by railroad-owned cars, and equal or exceed fully-distributed costs for 43 of 66 movements by TTX cars and for 14 of 66 movements by railroad-owned cars (R. 22).⁶ Consequently, the Commission concluded that, with the exception of the six rates returning less than out-of-pocket costs,⁷ the proposed TOFC rates are compensatory (R. 22, 34). Similarly, the corresponding Sea-Land and Seatrain rates—whose legality is not challenged⁸ in this proceeding—were, with one exception, found to be compensatory (R. 21, 25, 34).

hearing. The first of these consolidated dockets, I. & S. No. M-10415, *Commodities—Pan-Atlantic Steamship Corporation*, is the title under which the consolidated report is issued. The others are I. & S. No. 6834, *Piggy-Back Rates—Between East and Texas*; I. & S. No. 6906, *Commodities via Pan-Atlantic Between Texas, Louisiana and Florida*; and I. & S. No. M-11375, *Tires, Chemicals and Paints via Pan-Atlantic*. Under consideration in the three named dockets other than I. & S. No. 6834 were numerous rates of Sea-Land not at issue here. It was agreed that the evidence in each of the first two named dockets could be used in both to the extent relevant, and would be incorporated by reference in the last two named dockets. An examiner's report was filed in each of the four named dockets, and the Commission's Division 3 issued a report in I. & S. No. M-10415. (300 I.C.C. 587, R. 76-115).

⁶ TTX cars are flatcars leased by the railroads which hold two trailers, while railroad-owned cars have a capacity of one trailer per car (R. 21). No finding could be made as to the relative percentages of the TOFC traffic which would move in either type of car (R. 22, 36).

⁷ These six rates were withdrawn by the railroads and are not at issue.

With respect to the relative costs of the competing modes, the Commission found that the Sea-Land costs, both out-of-pocket and fully-distributed, are below the rail TOFC costs for all movements of comparable weight as computed for railroad-owned flat-cars, and are below the TOFC costs for all except two of the 66 movements for TTX cars (R. 21, 36). However, the Commission indicated that it was not resting its decision in these proceedings on relative costs. Thus, after concluding that it couldn't determine the low cost mode because of certain variables which affect costs and the absence of rail costs as to many of the rates,^{*} the Commission said: "We must recognize, also, that cost is only one of the elements which may appropriately be considered in passing upon the lawfulness of rates. In the exceptional circumstances here presented, other considerations, herein discussed, appear to us determinative of the issues." (R. 36-37).

The Commission found that uncertainty of ocean transport, infrequency of sailings, and longer transit time than by rail TOFC service are adverse service factors present in both Sea-Land and Seatrain service (R. 11, 13, 26-28); that there is no indication that Sea-Land has moved any traffic at rates as high as competing all-rail boxcar or TOFC rates (R. 22, 34) and it is conceded that Seatrain offers a lower quality service than TOFC (R. 26, 27); that most of

^{*} The absence of rail costs as to many of these rates refers to the rail costs for boxcar service, which was the competing rail service with respect to the numerous Sea-Land rates at issue in the other dockets embraced in the consolidated report which are not involved in this litigation.

the shippers prefer rail service to Sea-Land service except at lower rates for the latter (R. 34); and that, in order, to attract traffic, Sea-Land and Seatrain must maintain rates somewhat below those of the rail carriers (*ibid.*). The Commission concluded that the rail rate reductions would precipitate further reductions by the water carriers and "that the rate-cutting activity probably would not stop even at that destructive level, and that quite certainly a further vicious cycle of rate cutting would ensue" (R. 29). It also found (R. 35) that all of the Sea-Land traffic is subject to rail competition; that Sea-Land must recover its fully-distributed costs on its overall operations if it is to continue in operation; and that, if the differentially lower rates which Sea-Land must maintain to attract traffic in competition with the railroads were forced by such competition to be reduced to a point where they failed to recover operating costs plus a reasonable return, Sea-Land's operations would become unprofitable and their continuance threatened.

The Commission noted that while section 15a(3), 49 U.S.C. § 15a(3), prohibits the holding of the rates of a carrier to a particular level to protect the traffic of another mode of transportation, that prohibition is qualified by the words "giving due consideration to the objectives of the national transportation policy declared in the Act." And it pointed out that "It is the declared national transportation policy, among other things, to provide for fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, so administered as to recog-

nize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers, all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense" (R. 37). It expressly found (R. 38) that "The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operations, and thus the continued existence, of the coastwise water-carrier industry generally."

Next, the Commission summarized the facts showing the drastic decline in the Atlantic-Gulf coastwise trade, both in the number of companies engaged in the trade and the tonnage carried (R. 38). The Commission pointed out that at the outset of World War II, all of the vessels employed in the deep-water coastwise trade were taken over by the Federal government for national defense (*ibid.*). Quoting illustrative statements from reports of the United States Maritime Administration, the Senate Interstate and Foreign Commerce Committee, and from an earlier decision of its own, the Commission observed that the importance of coastwise shipping for national defense purposes has been emphasized repeatedly by various governmental sources and that it is important for general public use and to the economy of ports and

coastal areas as an integral part of the national transportation system (R. 38-40).^{*}

In addition, the Commission referred to the provisions of sections 305(c) and 307(d) of the Act, 49 U.S.C. §§ 905(c) and 907(d), as indicative of a Congressional intent that, where necessary to permit an essential, efficiently-operated water carrier to participate in the economical movement of traffic, the water carrier service should be accorded some advantage in the form of lower rates. It further noted that this is not confined to port-to-port traffic, for coastwise carriers cannot survive on such traffic alone; that there is no contention that the coastwise carriers involved here are not efficiently operated; and that, while there is a limit beyond which the coastwise carriers cannot be expected to attract traffic from interior points, the water carrier rates under investigation do not go beyond that limit. (R. 40-41).

The Commission concluded (R. 41):

In the circumstances presented here, we are of the opinion that the objectives of the national transportation policy require the establishment and maintenance of a differential relationship between the rates under investigation on sealand and Seatrain service, on the one hand, and the rates of the rail carriers, on the other, which will allow these water carriers operating in the coastwise trade to maintain rates that will enable them to continue efficient and economical coastwise service.

^{*} For a recent example, see *Ocean Shipping to Support the Defenses of the United States*, Department of the Navy (1961), reproduced at 107 Cong. Rec. 7299-7302 (1961).

It then stated that a 10 percent differential sought by Sea-Land appeared to be excessive but that, in its judgment, the TOFC rates at issue should be maintained on a level no lower than 6 percent above Sea-Land's rates so long as the latter are not increased above their present levels (R. 41-42). Accordingly, the Commission found the proposed reduced TOFC rates not shown to be just and reasonable, directed their cancellation without prejudice to the filing of new schedules in conformity with its conclusions, and denied the fourth section application for relief to establish the rates.

3. On February 2, 1961, the railroads filed suit in the district court to set aside the Commission's order to the extent that it required the cancellation of the TOFC rates. Sea-Land and Seatrain intervened and appeared in defense of the order. On November 15, 1961, the court rendered its opinion, concluding that the order requiring cancellation of the TOFC rates should be set aside, and the Commission enjoined from cancelling TOFC rates which return at least fully-distributed costs of carriage (R. 258).

The court held that the requirement of a rate differential to protect the water carriers is plainly holding up railroad rates to protect another mode in violation of section 15a(3), and that the evidence and findings do not support the Commission's position that the National Transportation Policy compels that result (R. 246-247). The court held that the national defense clause of the National Transportation Policy expresses only a "hoped-for 'end'" and not an "operative policy" effective to provide a basis for the Com-

mission's action, and that, in any event, the Commission's reliance on that clause was not supported by sufficient evidence (R. 256-257). At the heart of the court's decision is its construction of section 15a(3) as precluding the Commission from requiring rail rates differentially higher than water carrier rates to preserve the latter from destruction, except where (1) the rail rates are so low as to harm the rail carriers as well as the water carriers, or (2) the rail rates would deprive the water carriers of a proven inherent advantage of lower cost (R. 249, 251-252). In addition, while the court permitted the cancellation of those rail rates which do not cover the railroads' full costs (R. 258), it indicated that the Commission's rejection of the rail rates which exceed full costs is invalid for failure to find that such action is necessary to preserve the "overall rate structure" of water carriers which are the "overall low-cost mode" or "in general the low-cost mode" (R. 255-256). Finally, the court instructed the Commission that if it finds (1) that the water carriers are in general the low-cost mode and (2) that value-of-service considerations demand water carrier rates on particular movements and commodities which each return to the water carriers more than their fully-distributed costs, the Commission may require that the rail TOFC rates be set high enough to protect the water carrier traffic; but that a rail rate for a particular movement may not be disturbed if it yields rail fully-distributed cost which is lower than the water carrier fully-distributed cost (R. 259).

SUMMARY OF ARGUMENT

I

A. Section 15a(3) was the end product of several years of hearings and controversy on the proper scope and purpose of the regulation of intermodal rate competition. The evolutionary process began with a proposal, advanced by a Presidential advisory committee under the chairmanship of the Secretary of Commerce and supported by the railroads, which would have precluded the Commission from considering the effect of a proposed rate on competing modes of transportation. The proposal, known as the "three shall nots", and a substantially identical version proposed by the railroads were vigorously opposed by the Commission, the motor carriers, and the water carriers.

The "three shall nots" rule was expressly rejected by the Subcommittee on Surface Transportation of the Senate Commerce Committee. As the hearings progressed, section 15a(3) emerged in its present form. The testimony and the reports of the Senate and House committees (*infra*) show that the purpose and effect of the section is to insure that each mode of transportation will be free to assert such inherent advantages as it may possess so that the public may exercise its choice among them, cost and service both considered, and constructive competition will be encouraged. To accomplish this end, the Commission will be free to consider the effect of a proposed rate on competing modes under all the circumstances of a given case. Unfair and destructive competition are to be prevented now as before, and all of the

provisions of the National Transportation Policy, the objectives of which the Commission is expressly required "to give due consideration", apply in their full vigor.

B. We contend that the district court erred in holding that the Commission lacks power to intercede to prevent the threatened destruction of an efficiently operated competing mode of transportation unless the threatened mode is the low cost mode. Such a result does not give full effect to the objectives of transportation regulation enunciated in the National Transportation Policy, which require the Commission to look to the needs of the commerce of the United States and the national defense in administering the Act. We submit that where the survival of an efficiently operated mode of transportation bears an important relationship to the meeting of those needs, costs cannot be the sole criterion governing the Commission's action. Rather, the Commission is obligated to give overriding importance to the preservation of a transportation system adequate to meet the needs of commerce and the national defense.

Here the Commission found that survival of the coastwise water carrier industry is important to the accomplishment of this objective. As a consequence, it properly took such steps as were reasonably required to insure that survival.

II

The court below erroneously assumed that the Commission's decision may have been based upon value of service considerations, *i.e.*, that it rejected reduced rail rates in order to enable the competing water car-

rier to maintain rates returning more than its fully-distributed costs so as to offset the inability of other traffic to bear rates covering such costs. Accordingly, it was led into an abstract enunciation of principles and procedures which, in practical application, would largely prevent the Commission from applying value of service principles wherever carriers of different modes are competing for the same traffic. This Court should withhold its approval from such dictum.

ARGUMENT

INTRODUCTION

This appeal, along with the companion appeals, presents questions of fundamental significance respecting the administration of the Interstate Commerce Act in the important and difficult area of the regulation of intermodal competitive ratemaking. We think it important to emphasize at the outset significant factors which we think are necessary to an appreciation of the context in which these questions are presented.

First, the cost data tended to show that as compared to the rail TOFC movements at issue Sea-Land was the lower cost service, both on an out-of-pocket and a fully-distributed cost basis. Second, the rail reductions are to the same level as the rates of the water carriers, although the water carriers offer a qualitatively inferior service, and are confined to points where the railroads face water carrier competition, the former, higher rail rates being maintained elsewhere. Third, there was no contention by the railroads or shippers that the former rail rates were unreasonably high *per se*, that is, the reductions were

proposed as allegedly necessary to meet competition and not because the former rates exceeded a maximum reasonable level. Moreover, the corresponding water carrier rates which the railroads sought to meet were not unduly high considering the nature of the traffic. In fact, they were found to be lawful (R. 18, 42), and this aspect of the Commission's decision was not challenged in court and is not at issue here. Finally, the purpose and effect of the Commission's decision is neither to insulate the water carriers from rail competition nor to deny the shipping public the benefit of voluntary reductions in rail rates. Rather, it merely disapproved rate parity on the involved movements without prejudice to rail reductions to levels six percent higher than the water carrier rates so long as the latter were not increased above their present levels. The Commission refrained from entering a minimum rate order prescribing such differentials. Thus, its "without prejudice" language was merely an attempt to offer guidance to the carriers as to what, in its judgment, would be a reasonable relationship between rail and water carrier rates, leaving the railroads free to publish rates reflecting the six percent differential or to propose rates reflecting such different relationship as they might justify on a different record. In short, the Commission condemned selectively reduced rates for a superior service not shown to be the low cost service in order to permit an efficiently operated, essential transportation agency to compete at rates which are reasonable and commensurate with a degree of carrier prosperity.

The basic question is whether, under the above circumstances and in the light of section 15a(3), added to the Interstate Commerce Act in 1958, and the National Transportation Policy, the Commission may reject selectively reduced but fully compensatory rail rates¹⁰ to prevent the destruction of a competing coastwise water carrier industry which is important for national defense purposes and for general public use as an integral part of the national transportation system, without resting its decision on a finding that the threatened water carriers possess an inherent advantage of lower costs.

Assuming, *arguendo*, the district court's negative answer to the above question to be the correct view of the law, there is presented the question as to whether it is enough that the Commission find that the protected mode is low-cost on the particular movements at issue or whether it is required to determine in addition the low-cost mode on some overall basis, i.e., that the protected mode is the "overall low-cost" or "in general the low-cost mode", as the district court would seem to require. While we do not find the views of the district court entirely clear, it appears to have held that the Commission would not have been warranted in rejecting rail rates which exceed fully-distributed rail costs to protect the water carriers' rate structure unless it were able to find that (1) the water carriers are in general, or overall, low-cost and

¹⁰ As noted earlier (*supra*, at 12), the Court did not disturb the Commission's decision so far as it required the cancellation of the rail TOFC rates which were below the railroads' fully-distributed cost, and the railroads have not appealed from this aspect of the court's decision.

(2) that the rail rates must be held up above rail fully-distributed costs so that the water carriers may maintain rates which yield a sufficient return above the water carriers' fully-distributed costs to compensate them for the carriage of other traffic at rates which fail to yield their fully-distributed costs. The final question presented is whether the Commission is flatly prohibited from rejecting any rail rate for a particular movement which yields the railroads' fully-distributed cost which is lower than the water carriers' fully-distributed cost for such movement.

While the district court did not accept the interpretation of section 15a(3) urged upon it by the railroads,¹¹ the necessary effect of the court's decision is to substantially impair the viability of important provisions of the National Transportation Policy and to relegate the Commission to the role of a mere computer of costs in an area of regulation heretofore regarded as requiring the exercise of an informed and flexible discretion to take into account many relevant factors, see, e.g., *Board of Trade v. United States*,

¹¹ In the district court, appellees contended that section 15a(3) forbids the Commission from interfering with the establishment of reduced rates so long as they are compensatory, i.e., cover out-of-pocket costs, unless (1) the competing modes of transportation are in the throes of a destructive rate war evidenced by a series of successive rate reductions depressing rates to dangerously low levels, or (2) the reduced rates are part of a predatory campaign having the design and purpose to destroy competition. See suggestion to this effect at page 5 of appellees' Motion to Affirm in this Court. Thus, the railroads urged an interpretation of section 15a(3) which would render it virtually indistinguishable from an earlier version known as the "three shall nots" (*infra*, at 21-24) expressly rejected by Congress.

314 U.S. 534, 546; *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, 592-593; cf., *Boston & Maine R.R. v. United States*, 208 F. Supp. 661, 675 (D. Mass. 1962), affirmed *per curiam*, 371 U.S. 26. We submit that this result was never contemplated by Congress when it enacted section 15a(3), expressly reaffirming the obligation of the Commission to give due consideration to the objectives of the National Transportation Policy.

I

THE APPLICABLE STATUTORY STANDARDS OF THE INTER-STATE COMMERCE ACT REQUIRE THE COMMISSION TO CONSIDER THE FULL COMPETITIVE IMPACT OF RATE REDUCTIONS, AND REQUIRE IT TO REJECT REDUCED RATES, EVEN THOUGH FULLY COMPENSATORY, WHERE NECESSARY TO PREVENT THE DESTRUCTION OF A COMPETING MODE OF TRANSPORTATION IMPORTANT TO THE NATIONAL DEFENSE AND TO THE COMMERCE OF THE UNITED STATES

A. THE PURPOSE AND EFFECT OF SECTION 15a(3) IS TO REQUIRE THE COMMISSION TO REGULATE INTERMODAL RATE COMPETITION SO AS TO FOSTER CONSTRUCTIVE COMPETITION IN TERMS OF SUCH INHERENT ADVANTAGES OF COST AND SERVICE AS THE DIFFERENT MODES OF TRANSPORTATION MAY POSSESS, AND TO PREVENT COMPETITION WHICH IS DESTRUCTIVE IN THE LIGHT OF THE OVERALL OBJECTIVES OF THE NATIONAL TRANSPORTATION POLICY

Section 15a(3) was the culmination of several years of reports and hearings on the proper purpose and scope of the regulation of intermodal rate competition. In 1955, the President's Advisory Committee on Transport Policy and Organization, under the chairmanship of the Secretary of Commerce, issued a report, sounding the keynote that "Increased re-

liance on competitive forces in ratemaking constitutes the corner-stone of a modernized regulatory program," recommending a revision in the National Transportation Policy, and specifically recommending the elimination of the phrase "unfair or destructive competitive practices."¹² The committee proposed the following new ratemaking rule:¹³

In determining whether a rate, fare, or charge, or classification, regulation, or practice to be applied in connection therewith, results in a charge which is less than a reasonable minimum charge, as used in this Act, the Commission shall not consider the effect of such charge on the traffic of any other mode of transportation; or the relation of such charge to the charge of any other mode of transportation; or whether such charge is lower than necessary to meet the competition of any other mode of transportation. *Provided, however,* That the provisions of this paragraph shall not be construed to prohibit any carrier subject to this Act from protesting or complaining in the event that a rate, fare, or charge is filed or made effective which it believes to be less than a reasonable minimum charge.

¹² *Revision of Federal Transportation Policy*, Report by Presidential Advisory Committee on Transport Policy and Organization (1955), reprinted in *Transport Policy and Organization*, Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 84th Cong., 1st Sess. (1955):

¹³ Proposed section 15a(1) in H.R. 6141, 84th Cong., 2d Sess. (1956), reprinted in *Transportation Policy*, Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess., Part 1, at 5 (1956).

This proposal, containing what became known as the "three shall nots", was supported by the railroad industry and opposed by the Commission, the motor carriers, and the water carriers.

In vigorously urging adoption of the "three shall nots" rule, the railroads noted with approval that it would limit the Commission to the consideration of whether a particular reduced rate was reasonable *per se* and nondiscriminatory and would preclude any consideration of its effect on other modes of transportation. Thus, the railroads believed that, under the "three shall nots", "the Commission will then have to construe unfair and destructive competitive practices as limited to noncompensatory rates,"¹⁴

¹⁴ Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 6141 et al., 84th Cong., 2d Sess., Part I, April and May 1956, at 540, 554. It is interesting to note that the railroads could not bring themselves to completely support the views of the Secretary of Commerce; for, as the hearings progressed, the Secretary expressed the view that increased competitive freedom should extend to intra-mode (rail versus rail) as well as to inter-mode competition. In an abortive effort to accomplish this result, the 1957 version of the Advisory Committee bill added the language to make the "three shall nots" apply to the traffic of carriers of the same mode as well as of any other mode (H. 5521 and S. 1457, 85th Cong., 1st Sess.). In an interview reported in "Traffic World," April 6, 1957, at p. 25, the president of the New York Central (one of the appellees here) represented his views as those of the railroads generally, and stated:

We think the terms of the new bill would likely permit too much competition.

In the case of railroads, for example, this might happen: A small railroad or several small railroads might come in with cut rates that would upset the operations of the

The Commission "recommended strongly" against the proposed addition to section 15a of the "three shall nots" (House Subcommittee Hearings, *supra*, Part III, June 1956, at 1768). It observed that the proposed amendment would limit the Commission to "one test in determining the reasonableness of a rate—whether the rate is compensatory" and that "this would be highly impracticable and inimical to the maintenance of a sound transportation system." The Commission further noted that the proposal "would, in many instances, enable railroads to drive other forms of transportation out of business" and "with the disappearance of competitors the rates of the victors in such a struggle would not long remain on the depressed competitive levels." (*Ibid.*)

H.R. 6141^o died in committee. However, the railroads' alternative proposal for a new section 15a(3) incorporating the "three shall nots" was introduced in the 85th Congress as H.R. 5523 and 5524, reading as follows:¹⁵

(3) In the exercise of its power to determine and prescribe just and reasonable rates for carriers subject to this Act, the Commission shall not consider the effect of such rates on the traffic of any mode of transportation; or the relation of such rates to the rates of any other mode of transportation; or whether such

hundred or so major roads. We wouldn't want that to happen.

We need some sort of referee, some sort of umpire.

¹⁵ Printed in *Surface Transportation (Rate-making Legislation)*, Hearings before the Subcommittee on Surface Transportation of the House Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., April 1957, at 5.

rates are lower than necessary to meet the competition of any other mode of transportation.

Again the railroads emphasized that the "underlying purpose" of the legislation was to permit them to make rates "without regard to their effect (if any) upon competing modes of transportation" (*id.* at 199). And again the Commission voiced its strong opposition (*id.* at 46 *et seq.*).

From January through April, 1958, hearings were held before a Senate subcommittee under the chairmanship of Senator Smathers, covering the "three shall nots" as well as various proposals to aid the railroads not here relevant. In the course of these hearings, the Secretary of Commerce sent a letter to the subcommittee, withdrawing his support for the "three shall not" rule and unsuccessfully urging an antitrust standard "which would permit the Interstate Commerce Commission, in determining what is less than a reasonable minimum charge, to take into consideration the effect of a rate on competition or on a competitor only where its effect might be substantially to lessen competition or create a monopoly in the transportation industry or where the rate was established for the purpose of eliminating or injuring a competitor."¹⁶

The subcommittee rejected the railroads' proposal and recommended a new section 15a(3) providing as follows:¹⁷

¹⁶ Printed in *Problems of the Railroads*, Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., Part 4, April 1958, at 2348, 2353.

¹⁷ Report of the Subcommittee on Surface Transportation, annexed to S. Rep. No. 1647, 85th Cong., 2d Sess. (1958), at 18.

In a proceeding involving competition with another mode of transportation, the Commission, in determining whether a rail rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of traffic by railroad *and not by such other mode.* [Emphasis added.]

While the underscored portion of this proposal carries connotations of the "three shall nots," the subcommittee clearly intended something less restrictive. Thus, after noting that the railroads urged the enactment of legislation substantially restricting the Commission's authority, the subcommittee stated that it was "not convinced that the record before it justifies approval of the railroads' proposal." (*ibid.*).

Continuing, the subcommittee stated that the Commission should "follow the principle of allowing each mode of transportation to assert its inherent advantages" and sought to "admonish the Commission to be consistent in following the policy" which the subcommittee found in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 538 (1945), that the rates of one mode should not be held up to particular level to preserve another mode's rate structure. It also quoted with approval language from this Court's opinion in *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 91, to the effect that a mode's lower costs than those of competing modes is an inherent advantage which the Commission is required to recognize. The subcommittee stated its policy to be—

that each form of transportation should have opportunity to make rates reflecting the different inherent advantages each has to offer so

that in every case the public may exercise its choice, cost and service both considered, in the light of the particular transportation task to be performed. The subcommittee believes, and the national transportation policy is clear, however, that such ratemaking should be regulated by the Commission to prevent unfair destructive practices on the part of any carrier or group of carriers. (*Id.* at 18-19).

In May 1958, the Senate Committee on Interstate and Foreign Commerce held hearings on S. 3778, which contained the Senate subcommittee's version of section 15a(3). The Commission's views were presented by its Chairman, Commissioner Freas, testifying in its behalf. The Commission called attention to the conflict between the direction in the new amendment to the effect that the Commission shall not consider the facts and circumstances attending the movement of traffic by such other mode and the statement in the report of the subcommittee that the Commission should prevent unfair and destructive competitive practices.¹⁵ The Commission observed that although the subcommittee's report indicated that the amendment was not intended to embody the "three shall nots," "nevertheless, the uncertain purpose of the amendment would enable the railroads to contend that it is intended to give them complete freedom, in the presence of competition from another mode of transportation, to establish rates which merely cover out-of-pocket costs." (*ibid.*). Noting the general ac-

¹⁵ *Ratemaking Rule—ICC Act*, Hearings before the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., May 1958, at 167.

ceptance of the premise that "a purpose of rate regulation should be to encourage the flow of traffic by the most economical means," the Commission pointed out that determination of the most economical means of transportation "often cannot be made without considering the facts and circumstances attending the movement of the traffic by other modes of transportation" in addition to the proponent of the particular rates (*ibid.*).

The Commission went on to point out that—

Whenever conditions permit, give a transportation should return the full cost of performing carrier service. Certainly full costs in the aggregate have to be obtained in our transportation system if it is to be kept healthy. In many instances, however, the full cost of the low-cost form of transportation exceeds the out-of-pocket costs of another. If, then, we are required to accept the rates of the high cost carrier merely because they exceed its out-of-pocket costs, we see no way of preserving the inherent advantages of the low cost carrier.

Then the Commission noted that in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475 (1947), "the proceeding cited with approval in the subcommittee's report of April 30, the question of the distribution of the traffic was gone into at length (see pp. 484 to 492). However, with the proposition that rates of a low-cost carrier should not be held up to protect the traffic of other carriers we are in full accord."¹⁹ (*Id.* at 168)

¹⁹ Later (at p. 177), Chairman Freas again stressed that, "in the *New Automobiles* case, the Commission did consider the facts and circumstances surrounding the movement by all modes

While making it clear that it was not advocating change in the existing Interstate Commerce Act, the Commission suggested that the expressed views of the subcommittee might be incorporated into the Act by substituting for the proposed paragraph the following language (*id.* at 168-169, 179-180):

(3) In a proceeding involving competition between carriers, the Commission, in determining whether a proposed rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic. Rates of a carrier shall not be held up to a particular level to protect the traffic of a less economic carrier, giving due

that were involved there." The *New Automobiles* case involved rail-motor carrier competition in which the greater flexibility of trucks in making pickup and delivery gave the motor carriers a service advantage. The motor carriers contended that the railroads should not go below fully-distributed rail cost or the truck rates and sought a minimum rate order to achieve that result. The railroads contended that their rate must be substantially lower than the truck rates, if they are to get their share of the business. It was in this context that the Commission used the term "umbrella", saying (p. 539):

Freezing the rail and the motor-carrier rates on a common level would allocate additional traffic to the motor carriers, because of their door-to-door service and other advantages. For movements exceeding 200 miles, the rate parity and the advantages of the motor carriers would spread an umbrella over them, and bring them much more of the long-haul traffic, although for such distances they are least fit from a cost standpoint. . . .

Thus, the decision amounted to nothing more than a refusal by the Commission to issue a minimum rate order solely to prevent the low-cost, inferior-service carrier from establishing compensatory rates which would give it a reasonable opportunity to compete.

consideration to the inherent cost and service advantages of the respective carriers.

In response to questioning by Senator Smathers as to whether "the overriding statements in the national transportation policy" would not override the concluding phrase of the subcommittee proposal ("and not by such other mode") to which the Commission objected, and whether the objectionable phrase would prohibit the Commission from considering the provisions of that policy, Chairman Freas expressed the view that a conflict would be created resulting in unnecessary litigation (*id.* at 177). The following colloquy occurred (*id.* at 177-178):

SENATOR POTTER. Why don't we put in the amendment to conform with the national transportation policy, strike out the part "by any other mode."

SENATOR SMATHERS. The way I look at it if you strike that out, it is just like performing an operation—

SENATOR POTTER. Actually what we want the Commission to do is to conform to the transportation policy.

SENATOR SMATHERS. That is right.

COMMISSIONER FREAS. We will buy Senator Potter's suggestion.

Returning, at the invitation of Senator Smathers (*id.* at 178), to the Commission's substitute proposal, Chairman Freas called attention to the fact that it would apply to all types of carriers—to intramodal competition as well as intermodal (*id.* at 180). In explanation, he said that "there should be equality between all forms of transportation, and if the

language is to be used, we would suggest that it would not be limited between carriers of different modes" (*ibid.*). In response to questions from Senator Lausche, Chairman Freas stated that the Commission's proposal would be consistent with the congressional policy "that there shall be no deprivation to any mode of transportation of the benefits residing in their inherent advantage," and he affirmed the intent of the Commission "to give to each mode the full benefit of its inherent advantages" (*id.* at 181).

Senator Smathers expressed concern that the Commission's proposal, because of its application to intra-modal competition, might engender further controversy and delay (*id.* 182-183). He inquired whether the subcommittee's proposal with suggested changes would accomplish their purposes, and Chairman Freas agreed that it would and that it would not be objectionable to the Commission (*id.* at 183).

On June 3, 1958, the Senate Committee reported S. 3778 with amendments, recommending a new subparagraph (3) to section 15a in the form finally adopted, as follows (S. Rep. No. 1647, 85th Cong., 2d Sess. at 2):

In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of trans-

portation, giving due consideration to the objectives of the national transportation policy declared in this Act.

After pointing out that it had changed the subcommittee's proposal (*ibid.*), the Committee reproduced a substantial portion of the discussion of competitive ratemaking in the subcommittee's report, which it "agrees with and wishes to emphasize" (*id.* at 2-3). It then said (*id.* at 3-4):

The committee wishes further to emphasize that the amendment in regard to section 5 amending section 15a of the act as framed by the committee is designed to encourage competition in transportation by allowing each form of transportation subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to offer, with such ratemaking being regulated by the Interstate Commerce Commission, however, to prevent "unfair or destructive competitive practices" as contemplated by the declaration of national transportation policy. Under the committee amendment the principal emphasis, but not the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies.

In response to a request of Senator Magnuson, Chairman of the Senate Committee, the Secretary of Commerce commented on the new ratemaking provision by letter of June 4, 1958 (Hearings before the Senate Committee, *supra*, at 198-201). In his view,

the section would not go far enough "even if construed to permit the full exploitation of the inherent cost advantages. It would permit a rate reduction only if there were an existing or reasonably probable cost advantage" (*id.* at 199). He again advocated more competition "between all carriers whether or not of the same mode" and renewed his proposal of an antitrust standard to govern competitive rate-making (*id.* at 199, 201).

The House Committee included the Senate version of section 15a(3) as part of H.R. 12832, and reported the bill on June 18, 1958 (H.R. Rep. No. 1922, 85th Cong., 2d Sess.). After briefly summarizing the background leading to the new ratemaking amendment,²⁰ the Committee stated (*id.* at 13-14):

The Committee believes that each mode of transportation should have opportunity to make rates reflecting the different inherent advantages each has to offer so that the public may exercise its choice among them, cost and service both considered, in the light of the kind of transportation desired. The committee believes, however, and the national transportation policy is clear, that such ratemaking should be regulated by the Commission to prevent unfair destructive practices on the part of any carrier or group of carriers.

Expressing the belief that the Commission had not been consistent in allowing the various modes of

²⁰ In the course of its summary, the Committee noted that the Secretary of Commerce had expressed the view that "We have reconsidered the 'three shall not' rule and feel that it goes too far," and it characterized his proposal of an antitrust standard as "an inchoate suggestion" (*id.* at 13).

transportation to assert their inherent advantages in the making of rates, the Committee, like both Senate committees, referred approvingly to *New Automobiles in Interstate Commerce*, and this Court's decision in *Schaffer Transportation Co. v. United States* (*id.* at 14). It then stated (*id.* at 14-15):

The committee believes that the Commission consistently should follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of cost or service, giving due consideration to the objectives of the national transportation policy declared in the Interstate Commerce Act.

The objectives of this Policy of Congress are:

[Quoting the National Transportation Policy]

Finally, the Committee observed that "an amendment to the rule of ratemaking is desirable to serve as a guide to the Commission in achieving consistency" and that it "is of the opinion that the effect of this amendment will be to encourage competition between different modes of transportation for the benefit of the shipping public." (*id.* at 15).

As we interpret the legislative history,²¹ it demonstrates that section 15a(3) brought about no funda-

²¹ The debates on section 15a(3) in the Senate (104 Cong. Rec. 10816 *et seq.*) and in the House (104 Cong. Rec. 12522) appear to shed little light on the meaning and effect of the section beyond that to be gleaned from the history set forth above, particularly the committee reports. In general, they may be said to manifest an understanding of the intent of section 15a(3) consistent with the expressions in the reports. See remarks of Senators Schoeppel (104 Cong. Rec. 10817), Lausche (*id.* at 10822, 10842, 10859), Potter (*id.* at 10841,

mental change in the law. Rather, it would appear that the section's intended function was to insure that the Commission consistently apply the Congressional policy which had existed prior to the section's enactment, namely, that each mode of transportation be allowed to assert such inherent advantages as it may possess so that the public may exercise its choice among them, cost and service both considered, and constructive competition will be encouraged. Unfair or destructive competitive practices are to be prevented now as before, and all of the provisions of the National Transportation Policy (the objectives of which the Commission is expressly enjoined to give "due consideration") apply in their full vigor.

B. THE NATIONAL TRANSPORTATION POLICY REQUIRES THE COMMISSION TO REJECT REDUCED RATES, EVEN THOUGH FULLY COMPENSATORY, WHERE NECESSARY TO PREVENT THE DESTRUCTION OF A COMPETING MODE OF TRANSPORTATION IMPORTANT TO THE NATIONAL DEFENSE AND TO THE COMMERCE OF THE UNITED STATES. THE COMMISSION'S DECISION WAS A PROPER RESPONSE TO THIS COMMAND.

With the passage of the Motor Carrier Act of 1935, 49 Stat. 543, and the placing of water carriers under regulation in 1940, 54 Stat. 929, the authority and duties of the Commission were significantly expanded. The objectives towards which the enlarged functions were to be directed were supplied by Congress in the National Transportation Policy, 54 Stat. 899, enacted as part of the Transportation Act of 1940. That

10842, 10860), Bricker (*id.* at 10842, 10843-10844), Smathers (*id.* at 10859) and Congressmen O'Neil (*id.* at 12523), Harris (*id.* at 12531-12532).

Policy enjoins the Commission to administer the Interstate Commerce Act so as, *inter alia*—

to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

It concludes with the explicit command: "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."²² Thus, it has been characterized by this Court as "the yardstick by which the correctness of the Commission's actions will be measured" (*Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88) and "the Commission's guide to the public interest" (*McLean Trucking Co. v. United States*, 321 U.S. 67, 82).

The new role of the Commission was described by the Court in *Eastern-Central Assn. v. United States*, 321 U.S. 194, 205-206. The Court explained that

²² This command, the Whittington Amendment, was intended to make certain that the policy statement, itself, would become substantive law. For, as Representative Whittington stated, "unless the declaration of policy is enforced, the meaning of the declaration is absolutely lost". 84 Cong. Rec. 9862 (1939).

with the evolution of other forms of carriage than transportation by rail, the Commission became "not merely the regulator, but to some extent the coordinator of different modes of transportation." Hence, the Commission "was charged not only with seeing that the rates and services of each are reasonable and not unduly discriminatory, but that they are coordinated in accordance with the National Transportation Policy. . . . This, while intended to secure the lowest rates consistent with adequate and efficient service and to preserve *within the limit of the policy* the inherent advantages of each mode of transportation, at the same time was designed to eliminate destructive competition not only within each form but between or among the different forms of carriage." [Emphasis added.]

Long before the enactment of the National Transportation Policy, Congress had recognized the need to control the destructive aspects of rate competition, especially as it involved competition between the railroads and the water carriers. Thus, when in the Transportation Act of 1920, 41 Stat. 456, 484, it amended section 15(1) of the Interstate Commerce Act, 49 U.S.C. § 15 (1), to empower the Commission to fix minimum rates, it gave as one of the reasons (H.R. Rep. No. 456, 66th Cong., 1st Sess. at 19 (1919) :

[The minimum rate power] would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its water competitor. Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of

rates as to make it impossible for the water carrier to survive. When once competition was thus driven off the rail rates would be restored or would rise to even higher levels. . . .

The need for protecting water carriers from destruction and the public from the consequences of the elimination of competition was further emphasized by Chairman Esch of the House Committee on Interstate and Foreign Commerce, speaking in support of the minimum rate provision (58 Cong. Rec. 8317):

There is an advantage in giving the Commission authority to fix a minimum rate. The Commission has never heretofore had that power since the original act was adopted in 1887. We give it the right of fixing the minimum rate in order that it may meet some of the problems arising out of the long-and-short-haul clause as contained in the fourth section. We give it the right of fixing a minimum rate in order that it may protect a water carrier against the destructive competition of a rail carrier. You know the story—you can read it upon every mile of every inland waterway of the United States—how the water carrier started, and then the rail carrier paralleled the river bank and made a rate so low that the water carrier had to abandon its line and its route, and after such abandonment the rail carrier raised the rate and the public was no better off and was, in fact, worse off than before. If the Commission fixes the minimum rate, it can say to the rail carrier: "Thus far you can go, but no farther." The water carrier must be permitted to live. To do this we must provide for the minimum rate.

As the Court said in the *New England Divisions Case*, 261 U.S. 184, 189, 190 n. 8, "The 1920 Act sought to ensure adequate transportation service. . . . To this end, also, the Commission was empowered, among other things . . . to fix minimum, as well as maximum, rates; and thus prevent cut-throat competition and the taking away of traffic from weaker competitors." See also *New York v. United States*, 331 U.S. 284, 346 ("[T]he power of the Commission so to fix minimum rates as to keep in competitive balance the various types of carriers and to prevent ruinous rate wars between them . . . plainly is one of the objectives of the Act. . . .").

Under the 1940 Act, the Commission has, on a number of occasions, rejected reduced but compensatory rates when convinced that they would lead to the destruction of competing modes needed by the public.²³ It would seem clear that the Commission could not do otherwise if it were to preserve for the public an adequate transportation system by all modes and the benefits in improved services and reasonably low rates which flow from competition. In fact, in at least two cases, courts have set aside orders of the Commission approving rate reductions for failure of the Commission to consider whether the rates would lead to the extinction of competing modes. See

²³ *Pig Iron From Rockwood, Tenn., to Chicago and Joliet*, 298 I.C.C. 430 (1956); *Petroleum Products in California and Oregon*, 284 I.C.C. 287 (1952); *Petroleum Products in Illinois Territory*, 280 I.C.C. 681 (1951); *Pig Lead from Brownsville, Tex., to Chicago and St. Louis*, 280 I.C.C. 585 (1951); *Petroleum Products from Los Angeles to Arizona and New Mexico*, 280 I.C.C. 509 (1951).

Pacific Inland Tariff Bureau v. United States, 129 F. Supp. 472 (D. Ore. 1955), motion for new trial denied, 134 F. Supp. 210 (1955); *Cantlay & Tanzola, Inc. v. United States*, 115 F. Supp. 72 (S.D. Cal. 1953).²⁴ And in *Scandrett v. United States*, 32 F. Supp. 995, 997-998 (D. Ore. 1940), aff'd, 312 U.S. 661, before the enactment of the National Transportation Policy, the court held that the Commission had the power to fix minimum rates for the railroads so that they could not put an end to the existence of water competition.

In any event, the National Transportation Policy is explicit in its direction that the Commission act in the light of the needs of national defense (See *United States v. Capital Transit Co.*, 338 U.S. 286, 290; *United States v. Capital Transit Co.*, 325 U.S. 357, 361-362; *Cantlay & Tanzola, Inc. v. United States*, 115 F. Supp. 72, 80-81 (S.D. Cal. 1953)) and the commerce of the United States. So long as the overall objective of the Congressional regulatory plan is "developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as by other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense", the Commission may not refrain from taking the steps which it properly finds necessary to prevent the destruction,

²⁴ Cf., *Columbia Transportation Co. v. United States*, 167 F. Supp. 5 (E.D. Mich. 1958) and *National Water Carriers Assn. v. United States*, 120 F. Supp. 719 (S.D. N.Y. 1954), sustaining orders of the Commission approving rail rate reductions on the ground that the traffic would continue to be available to both the railroads and the water carriers with no danger of destroying the latter.

or even the substantial impairment, of an efficiently operated mode of transportation of significant value to the accomplishment of the stated objective. As the Court said in *Capital Transit Co. v. United States*, *supra*, 325 U.S. at 362, "Congress unequivocally reserved to the Commission power to regulate the reasonableness of interstate rates in the light of the needs of national defense. . . ."

Here, the Commission plainly regarded the survival of the coastwise water carrier industry as necessary (R. 38-40, 41). It concluded that coastwise shipping is important to the national defense and that it is important for general public use and to the economy of ports and coastal areas as an integral part of the national transportation system (*ibid*). We submit that this was a conclusion which an informed Commission with continuing responsibilities in this area was competent to reach. Plainly, the Commission had a right to rely on its "cumulative experience" with the regulation of the transportation industry. *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349.

Its soundness can scarcely be questioned. Obviously, the coastwise carriers were of vital importance to the national defense during World War II, when all of the vessels employed in the coastwise trade were taken over by the Government for national defense (R. 38). There we had the proof of the pudding. Their continued importance both to the national defense and to the ports and coastal areas, was made plain in the illustrative material from which the Commission quoted—a report of the United

States Maritime Administration, a report of the Senate Interstate and Foreign Commerce Committee, and a Commission decision (R. 38-40). As the Maritime Administration study and the Senate Committee report reflect, the unique national defense importance of the coastwise shipping industry lies in the ready availability of their ships at sea should a future war devastate land modes of transportation, a factor which may be critical in any initial military or civil defense operation.

The Commission might have excerpted the testimony of Vice Admiral Ralph E. Wilson, Deputy Chief of Naval Operations (Logistics), before a Senate subcommittee in 1960 to the same effect, and also pointing out the desirability of the ships which "are modern and are equipped for containerized operations and for rapid cargo handling."²⁵ A still more recent expression, issued subsequent to the Commission's decision and confirming in detail its conclusion as to the defense importance of the coastwise carriers, may be found in the letter of Vice Admiral John Sylvester, Deputy Chief of Naval Operations (Logistics) to Senator Butler, dated March 10, 1961, with supporting document entitled *Ocean Shipping To Support the Defenses of the United States*, Department of the

²⁵ *Decline of Coastwise and Intercoastal Shipping Industry*, Hearings before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess. (1960) at 105-106. For a statement of the commercial importance of the coastwise service to port cities, see testimony of Hon. W. L. Minglehoff, Jr., Mayor of Savannah, Ga. (*id.* at 83-86).

Navy (1961), reproduced at 107 Cong. Rec. 7299-7302 (1961).²⁶

In the present case, the railroads have lowered their rates to the water carrier levels between selected points as a "pilot" effort (R. 19). The Commission,

²⁶ In his letter, Vice Admiral Sylvester said, "Our coastwise fleet which prior to World War II comprised the largest segment of the merchant marine, remains in a depressed state. . . . This domestic deepwater fleet is more significant to our defense shipping capability than the number of ships and the tonnage would indicate. In their operations these ships are never far from major U.S. ports and, as a group, are the most readily available for emergency use of all ships under U.S. control. . . ." (*id.* at 7299).

The supporting document points out that practically the entire coastal and intercoastal merchant fleet was put into service during World War II "directly supporting the war;" that now only three companies are currently furnishing common carrier service, and one of these, Luckenbach Steamship Co. has announced its intention to terminate; that these ships occupy a "particularly significant position" as "the most readily available for emergency usage;" that this means they "must be active and operating commercially at the time they are first needed;" that "at the onset of a major, nuclear war, the domestic deepwater fleet would be uniquely fitted to act as a link between our coastal cities during the period of likely disruption of land transportation;" and that "a number of these ships are especially adapted for rapid cargo handling, giving them an increased value at such a critical time." (*Id.* at 7301). Earlier the special need for "roll-on roll-off ships" and ships "designed to carry containerized and prepalletized cargoes" was stressed (*id.* at 7300).

We note that the above document and the statement of Vice Admiral Wilson, *supra*, completely refute the district court's strained interpretation that it was the now out-moded "break-bulk capacity" which made the coastwise shipping important to the national defense (R. 257). Clearly, the modern, more efficient container ships merely enhance the value of shipping whose basic importance has been, and is today, its availability for emergency use in time of war.

drawing on the record and its cumulative experience with the industry, found that at equal rates the water carriers would not be able to compete—that, in order to attract traffic they must maintain rates somewhat lower than the rail carriers (R. 34). The Commission concluded that the reduced rates of the railroads—the pilot run preliminary to an overall program of rate reductions, for there can be no rational purpose to any such experiment except to pave the way for a general program of like reductions²⁷—“can fairly be said to threaten the continued operations, and thus the continued existence of the coastwise water-carrier industry generally.” (R. 38). This follows from the fact that the water carriers have only two alternatives: to lower their corresponding rates or not to lower them. If they do not lower their rates, TOFC, the mode of transportation with the superior service, will capture the traffic, depriving the water carriers of revenues and increasing the burden of fixed costs on the rest of their traffic. The more probable alternative (see R. 29) is that water carrier rates will be cut differentially below TOFC rates, since the water carriers have a lower out-of-pocket cost level to which they can descend than has TOFC (R. 21, 36). The net result, as the Commis-

²⁷ We note that the provisions of section 3(1), 49 U.S.C. § 3(1), make it unlawful for the railroads permanently to favor the Dallas-Ft. Worth area with such preferentially lower rates as they propose in their “limited pilot effort” without making the same advantage available to any other similarly situated “port, port district, gateway, transit, region, district, territory, or any particular description of traffic,” where they compete with the water carriers.

sion pointed out (R. 29), would be essentially the same situation as presently obtains, but on a substantially depressed rate level; and the Commission concluded that matters would probably not stop after merely one such round of rate-cutting, but would continue spiraling down destructively.

The current state of water carriers has become a matter of increasing national concern. Thus, in his special message to Congress on regulatory agencies, on April 13, 1961, President Kennedy declared that, despite the articulated goal of the Transportation Act of 1940 "to give each method of transportation its appropriate role in our economy . . . it is disturbing . . . to note that, for example, our common carrier inland waterway traffic, our Great Lakes Traffic, our intercoastal and coastal traffic have been withering away, at a pace far more rapid than appears desirable in the light of the low-cost nature of this method of transportation and its potential role in the event of war." H.R. Doc. No. 135, 87th Cong., 1st Sess. (1961), reprinted at 107 Cong. Rec. 5814 (1961).

There is no doubt that the water carrier industry has suffered a severe decline. Of the 19 coastwise carriers in 1941, only the two involved in the present case are left, and they are transporting a fraction of the tonnage formerly moving in this trade (R. 38). We submit that, in the circumstances, the Commission acted properly to prevent further erosion of an efficiently-operated coastwise water carrier industry in the interests of the national defense, our ports and

coastal areas, and the shipping public.²⁸ The district court's opinion would require that the entire national transportation system be run solely with an eye to costs, thereby subordinating every other national interest to that often elusive standard. Surely, this can't be the law. See *Alabama G. S. R. Co. v. United States*, 340 U.S. 216, 223 n. 4, and cases cited there; *Eastern-Central Assn. v. United States*, 321 U.S. 194, 210. We submit that such a result is not in keeping with the letter or spirit of the National Transportation Policy.

²⁸ As noted earlier, *supra*, at 16-17, the reduced rail rates at issue in the present case were not the result of a belief by the railroads that their former rates were too high *per se*; nor were they the result of shipper complaints to that effect. It was the presence of the water carriers which stimulated the reductions proposed, and the reductions which the Commission would permit. If these water carriers were to be eliminated, it is not likely that the rail rates would long remain at the reduced levels. Competition having been destroyed under the banner of freedom to compete, the public would be the ultimate loser.

The district court erroneously stated that section 4(2) of the Act, 49 U.S.C. § 4(2), would prevent such a result (R. 257). That section provides that where a railroad in competition with a water carrier reduces its rates to or from competitive points, it shall not again increase them until the Commission finds "that such proposed increase rests upon changed conditions other than the elimination of water competition." However, section 4(2) does not apply to rates authorized under section 4(1), *Skinner & Eddy Corporation v. United States*, 249 U.S. 557, 568, and the rail rates at issue would require such authorization (*supra*, at 6).

THE DISTRICT COURT ERRONEOUSLY CONJECTURED THAT THE COMMISSION'S DECISION MAY HAVE BEEN BASED UPON VALUE OF SERVICE PRINCIPLES IN THAT IT WAS PROTECTING SEA LAND RATES IN EXCESS OF FULLY DISTRIBUTED COSTS TO OFFSET SEA LAND RATES ON OTHER TRAFFIC WHICH ARE INCAPABLE OF COVERING FULLY DISTRIBUTED COSTS. ACCORDINGLY, THE LOWER COURT'S CONCLUSIONS AS TO HOW THE COSTS OF CARRIERS OF COMPETING MODES SHOULD BE DETERMINED UNDER VALUE OF SERVICE CONCEPTS SHOULD BE DENIED APPROVAL BY THIS COURT

The court below stated (R. 252) that "We cannot help wondering if the Commission's obvious reluctance to accept as critical the relative costs of service by the competing modes of transportation may not be attributable less to its interpretation of the applicable law than to its fear that the process which it has developed of so-called value-of-service ratemaking will be jeopardized if it be required to make critical findings as to the comparative costs of competing modes of transportation".

The "value of service" concept in ratemaking, as used by the court below and in this brief, is that many high value commodities bear rates returning more than the carriers' fully-distributed costs of transporting such commodities, so that such rates make a contribution to the carriers' fixed or overhead costs which will compensate for the fact that many low value commodities are carried at rates returning less than fully-distributed costs.

We agree with the United States that in this case the Commission was not purporting to protect the Sea Land rates in issue so as to enable it to offset

any inability which it may encounter in recovering its fully-distributed costs of transporting other commodities. Where the Commission applies the value of service principle in protecting or enforcing a higher rate level on high value commodities than would be appropriate where that principle is not applicable, it does so in unmistakable terms. See, e.g., *Tobacco, North Carolina to Central Territory*, 309 I.C.C. 347 (1960). Accordingly, we are sympathetic both with the view of the Department of Justice that this Court should not determine value of service problems in the abstract, and with the suggestion in the appellees' Motion to Affirm that the discussion of value of service in the opinion below may be ignored as dictum. However, we must point out that unless this Court in some way specifically refrains from endorsing the views of the court below on value of service principles (which were not involved in this case) the Commission (and the transportation industry) probably will be confronted in the lower Federal courts, in cases which in fact involve value of service rate making, with judicial reiteration of the value of service views of the court below. Indeed, this process has already begun. *St. Louis-San Francisco Ry. Co. v. United States*, 207 F. Supp. 293 (E.D. Mo. 1962).

The speculation of the court below, that the Commission's decision here may have been based upon value of service considerations, led it to make the following statements (R. 255):

... But if the Commission decision does represent such an attempt to preserve its value-

of-service ratemaking structure, the decision must fall for lack of evidence and necessary findings. For the Commission would have been warranted in holding up the TOFC rates for these 66 movements to protect an *integral overall rate structure* for Sea-Land only on evidence and findings that, notwithstanding the § 15a(3) prohibition of differentials, the *integral overall rate structure* was required by one or more of the policy-factors enumerated in the NTP, and particularly the policy to protect the "inherent advantages" of the overall structure against "destructive competitive practices" and "the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service." Sec. 15a(2).

... True, it found that as to many of the 66 movements in question, Sea-Land was a lower-cost mode than TOFC; but it did not find that Sea-Land service was in general a lower-cost mode than railroad service in general. . . . We conclude that, for lack of evidence and findings that Sea-Land was in general the low-cost mode, the action of the Commission, in so far as it sought to protect Sea-Land's overall rate structure, was an unlawful interference with the forces of competition fostered—not proscribed—by § 15a(3).

Our view that the foregoing language from the opinion below should not be left without comment by this Court is confirmed by the emphasis with which it was summarized by the lower court in the penultimate paragraphs of its opinion, apparently as instruc-

tions to govern Commission action on remand, as follows (R. 258-259):

Accordingly, the order requiring cancellation of the TOFC rates is set aside, and the Commission is enjoined from cancellation of TOFC rates which return at least the fully-distributed cost of carriage.

If, however, on some enlarged record the Commission shall find that the water carriers are in general the low-cost mode, and if it also finds that value-of-service considerations demand water carrier rates on particular movements and commodities which each return to the water carriers more than their fully-distributed costs, our injunction will not go so far as to prevent the Commission from requiring that TOFC rates be set high enough to protect water carrier traffic; provided, however, a railroad rate for a particular movement, if it yields the railroad's fully-distributed cost which is lower than the water carrier's fully-distributed cost, may not be disturbed. It is noted that at least two of the rates involved in this proceeding were found to fall in this two-pronged category.

The quoted language apparently means that the Commission may not require a railroad, for example, to maintain a rate on particular traffic above a level which covers its fully-distributed cost, to enable a competing carrier of another mode to maintain a rate sufficiently above the latter's fully-distributed cost to offset the failure of other traffic to return fully-distributed cost unless the Commission finds that such competing carrier is (1) the low cost mode on a fully-

distributed cost basis on the particular traffic, and (2) possesses an "overall rate structure" which generally reflects lower fully-distributed costs than the railroad's (or railroads') overall rate structure.

To begin with, it should be noted that the suggested principles or procedures would apply to competitive rate matters involving not only rail vs. water but also rail vs. motor and motor vs. water, as well as to the rates of rail, motor, or water carriers.

To repeat, as here used, value of service in rate-making means that certain high value commodities bear rates returning more than the carriers' fully-distributed cost of transporting such commodities, thereby making a contribution to the carriers' fixed or overhead costs which will offset the fact that many commodities are carried at rates returning less than fully-distributed costs.²⁹ While such value of service pricing of transportation services may not be as prevalent as when the railroads had a virtual monopoly

²⁹ Pertinent here is the following comment of Senator Wheeler, Chairman of Senate Committee on Interstate and Foreign Commerce, during debate on the Transportation Act of 1940 which enacted the National Transportation Policy (86 Cong. Rec. 11290 (1940)):

Let us suppose, for example, a situation where competing railroads, coast-wise steamship lines, and trucks are all maintaining, to their own and the shippers' satisfaction in general, a comparatively high level of freight rates on various packaged goods of high value, and some carrier, for the sake of a temporary advantage, undertakes to cut these rates. If this must be allowed, ultimately all the competing rates will be reduced and a hole created in carrier revenues which may make it necessary to increase rates on traffic less able to stand the burden. We think that it should not be allowed, and that the Commission

of surface transportation, it remains, as the court below noted, an important and pervasive element of the rate structure (R. 253). It may be, as some contend, that changing competitive and other conditions will subordinate value of service to cost as the basis for pricing transportation services. Nothing in the 1958 amendment or in its legislative history even suggests a Congressional purpose to uproot overnight every vestige of value of service pricing in the rate structure. Stated otherwise, if value of service is to be wholly subordinated to cost, it is essential to many industries and thousands of shippers that it occur gradually so as to minimize its impact upon marketing costs and patterns.

The opinion of the court below, while not in terms outlawing the value of service element in ratemaking under the Interstate Commerce Act, may well do so as a practical matter, and quickly, by imposing a very heavy evidentiary burden as a prerequisite to applying the value of service principle.

We should emphasize that the pertinent portion of the opinion below may be ambiguous as to what portion of the traffic of a protesting or protected carrier must be subjected to such cost analysis. Read literally, it appears to mean that before the low cost mode on

should be in a position to prevent such a train of events by exercise of its authority over the minimum rates.

At an earlier stage in that legislative process, Senator Wheeler pointed out (84 Cong. Rec. 9964) that:

... there are certain movements of freight traffic on the railroads, or anywhere else for that matter, that will not move unless it has a cheap rate. Much of that includes agricultural products. . . .

the particular high value traffic at issue is entitled to minimum rate protection at above its fully-distributed costs for the transportation of that traffic (in order to offset the inability of other segments of traffic, due to its low value, to bear rates returning fully-distributed costs) that carrier must show that it is also the low-cost mode in terms of fully-distributed costs as to all or most of its traffic (*i.e.*, its overall rate structure). This would impose upon the protesting carrier the novel and heavy burden of preparing current cost studies for each of its traffic movements—since costs vary with the weight and bulk of commodities and the length and direction of movement.

Assuming, however, that protesting carrier A, *e.g.*, Sea-Land, or a railroad or a motor carrier of general commodities, met the burden of breaking down the fully-distributed costs of its traffic consist, those costs must then be compared with the fully distributed cost pattern of the competing mode B's overall rate structure. It should be noted that in many significant intermodal rate cases, each of the competitive modes may involve a significant number of carriers with varying degrees of participation in rates and routes. It may be, although the opinion below does not touch on the point, that much would depend on the relative costs at which A and B carry traffic in competition with carriers other than each other. In any event, B's costs presumably would not be available to A. The opinion below leaves it uncertain as to whether B (or any other carriers with whom A and B compete for

traffic) would be under any duty to come forward with such broad countervailing cost-studies.

The portion of the lower court's opinion here discussed may be read for the perhaps more limited proposition that the carrier to be accorded such minimum rate protection in high value traffic at issue must also produce cost evidence showing that it is the low cost mode on that segment of its traffic which it is carrying at rates returning less than fully-distributed costs. This too would be an impractical burden. It is enough to point out that this would at least double the scope of the cost issues and evidence in such a rate proceeding. Moreover, such a carrier may be carrying low value commodities in competition with carriers of another mode not parties to the immediate rate controversy—thereby complicating the problems involved in ascertaining whether such carrier is the low cost carrier as to such traffic.

Under either reading of this portion of the opinion below, the preparation and presentation of such cost evidence would increase substantially the expense and time involved in any rate proceeding in which value of service principles might be applied. As a practical matter, it might make impossible the application of such principles. This Court is aware of the public interest involved in the completion of rate proceedings, whenever possible, within the seven-month suspension period authorized by Section 15(7) of the Act. Cf: *Arrow Transportation Co., et al. v. Southern Ry. Co. et al.*, No. 430, awaiting argument in this Court. Similarly, we are not aware of anything in the history of the 1958 amendment to section 15a(3) which suggests

that Congress intended to require the application of such expensive and time-consuming approaches to costs. To the contrary, the report of the Subcommittee on Surface Transportation of the Senate Committee on Interstate Commerce, which is annexed to S. Rep. No. 1647 85th Cong., 2d Sess. (1958) at 13, urged more expeditious handling of rate cases by the Commission.

One other element of the lower court's discussion of value of service should be noted. It apparently held that even if value of service ratemaking is otherwise appropriate, the carrier which is the low cost mode on a fully-distributed cost basis for a particular movement of traffic may not be required to maintain a rate above its fully-distributed cost (R. 259). Briefly, the application of such a principle would largely eliminate the Commission's ability to require certain high value commodities to contribute something more than fully-distributed costs to carrier overhead, even where necessary to protect the revenues of the proponent of the rate.

Accordingly, we submit that whatever disposition is made of this case, the Court should make clear that the views expressed by the court below on value of service principles and procedures were not in issue on the record before it and are therefore not controlling in Commission and court proceedings in which value of service questions are present.

CONCLUSION

The judgment below should be reversed.
Respectfully submitted.

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APPENDIX

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C., preceding sections 1, 301, 901, and 1001, provides:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 15(7), 49 U.S.C. 15(7), provides:

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new indi-

vidual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose

behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 15a, 49 U.S.C. 15a, provides:

(1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

(3) In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers

to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

Nos. 108, 109, 110, 125

INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS

**NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, ET AL.**

**ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT**

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 241-262) is reported at 199 F. Supp. 635. The opinion of the Commission (R. 4-69) is reported at 313 I.C.C. 23.

JURISDICTION

The judgment of the three-judge district court (R. 263-264) was entered on January 8, 1962, and notices of appeal were filed by the United States (R. 268-270), the Interstate Commerce Commission (R. 264-266), Sea-Land Service, Inc. (R. 266-268), and Seatrail Lines, Inc. (R. 271-272) on March 9, 1962. This Court's jurisdiction on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by *United States v. Central Vermont Ry., Inc.*, 366 U.S.

272, and *Interstate Commerce Commission v. J-T Transport Co., Inc.*, 368 U.S. 81.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding Section 1, and Sections 15(7) and 15a of the Interstate Commerce Act, 49 U.S.C. 15(7), and 15a, are set forth in the Appendix, *infra*, pp. 51-54.

QUESTIONS PRESENTED¹

Appellee railroads proposed substantially reduced rates for trailer-on-flatcar ("TOFC") service between certain points also served by coastal water carriers. The water carriers' fully distributed costs of moving the traffic involved were, in almost all instances, below the fully distributed costs of the railroads' TOFC service. The reduced rates, which exceeded the railroads' out-of-pocket costs in all cases and in many instances exceeded their fully distributed costs, were at the level of the water carriers' rates for the same traffic, but were substantially below the level maintained by the railroads for similar traffic between points not served by the water carriers. The Interstate Commerce Commission cancelled the reductions on the grounds that the water carriers could not compete with railroads at equal rates; that the reductions were the initial step in a general rate-cutting program which threatened the water carriers' continued exist-

¹ Although the precise formulation of the questions here differs from that in our Notice of Appeal and Jurisdictional Statement, we believe that the questions as presently stated reflect "the substance of the questions already presented" within the meaning of Rule 40(1)(d)(2) of the Revised Rules of this Court.

ence; and that the water carriers were essential to national defense and an integral part of the national transportation system. The district court reversed.

The questions presented are:

1. Whether, in the light of the National Transportation Policy and Section 15a(3) of the Interstate Commerce Act, the Commission was precluded from cancelling the reduced rail rates on economic grounds, without a finding that they interfered with the right of the water carriers to realize an inherent advantage of cost or service which they possessed.

2. Whether, if no such inherent advantage is infringed by the TOFC rates at issue, the Commission might nonetheless cancel them on the ground that they threaten the survival of a mode of transportation whose continued existence is required to meet the needs of the national defense, the postal service, or the commerce of the United States.

STATEMENT

This case involves the validity of an order of the Interstate Commerce Commission directing the cancellation of substantial reductions proposed by several railroads on some 66 commodity rates for trailer-on-flatcar (TOFC) service between various points in the East, on the one hand, and Dallas and Ft. Worth, Texas, on the other. The proposed rates were limited to points served by the only deep-water common carriers now engaged in the Atlantic-Gulf coastwise trade, Sea-Land Service, Inc. (formerly Pan-Atlantic Steamship Corporation) and Seatrail Lines, Inc.

1. THE COMPETING CARRIERS

Sea-Land provides an Atlantic-Gulf coastwise service by motor-water-motor. Freight is moved by certificated motor carriers (or by use of Sea-Land's own motor equipment) in highway trailers over the road to the port of origin, where the trailers are lifted onto Sea-Land ships for movement via water to the destination ports. At the destination ports, the process is reversed. This service was instituted by Sea-Land in 1957 when substantial increases in its operating costs as a break-bulk² water carrier led it to suspend its Atlantic-Gulf break-bulk service and to convert four vessels into trailerships, each capable of holding 226 demountable truck trailers. Conversion to the more efficient trailership service has reduced Sea-Land's operating costs and has brought about a reduction in both cargo-handling time and in-port vessel time (R. 7-10, 79-84, 168-176, 243).

Seatrail provides Atlantic-Gulf coastwise service by rail-water-rail. Freight is transported to its dock at Edgewater, New Jersey, in railroad cars. The cars and their contents are then lifted onto Seatrain's vessels for carriage by water to Atlantic and Gulf ports. The cars then move by rail to the consignee. This service offers the shipper transportation in a single rail car from consignor to consignee (R. 243).

The railroad TOFC service involved here is a motor-rail-motor operation in which a motor carrier trailer loaded by the shipper is hauled by road to a

² Break-bulk Service involves the physical unloading of freight from rail-car or truck into ships at the port of origin and the reverse operation at destination.

5
railhead, where it is loaded onto a flatcar, and demounted at destination for delivery by motor carrier to the consignee. Although this type of service has been furnished sporadically since 1926, it has grown in recent years, and the TOFC service between the points covered by this proceeding was inaugurated in the summer of 1956 (R. 244).

Traditionally, water rates, including water-rail and water-motor rates, have been lower than the corresponding all-rail rates. Water service has also been slower, less frequent, and more perilous (R. 10-11, 87, 179). When Sea-Land inaugurated its new trailer-ship service in 1957, it published rates which were, in general, 5 to 7½ per cent lower than the corresponding all-rail boxcar rates, a narrower differential than that which had theretofore existed (R. 11-12, 88, 180-181, 243).

By schedules filed to become effective on November 14, 1957, and later, the railroads proposed to establish reduced TOFC rates for numerous commodities between points in the East and in Texas, which were approximately at the level of Sea-Land and Seatrail rates on the same traffic. Upon the protests of the Secretary of Agriculture, Sea-Land, Seatrail, and other interested parties, the rates were suspended and

Since the establishment of these rates would leave higher rates in effect to and from intermediate points involving shorter hauls in violation of the long-and-short-haul provisions of Section 4(1) of the Act, 49 U.S.C. 4(1), the railroads also applied to the Commission for the relief from those provisions which Section 4(1) permits the Commission to authorize "in special cases." See *A. L. Meckling Barge Lines, Inc. v. United States*, 368 U.S. 324.

placed under investigation. On December 19, 1960, the Commission issued its report and accompanying order:

2. THE COMMISSION'S DECISION

The Commission found that the proposed TOFC rates equaled or exceeded out-of-pocket costs for all listed movements by railroad-leased TTX⁴ cars and for all but six movements by railroad-owned cars, and equaled or exceeded fully distributed costs for 43 of 66 movements by TTX cars and for 14 of 66 movements by railroad-owned cars (R. 22). The Commission concluded, therefore, that with the exception of the six rates returning less than out-of-pocket costs—rates which were withdrawn by the railroads and are not at issue here—the proposed rates were compensatory (R. 22, 34). Similarly, the corresponding Sea-Land and Seatrains rates—whose legality is not challenged in this proceeding—were, with one exception, found to be compensatory (R. 21-22, 23-25).

The Commission then turned to the question “whether these rates constitute destructive competition” (R. 34). With respect to the relative costs of the competing modes of transportation, the Commission found that Sea-Land’s costs of moving the traffic, both out-of-pocket and fully distributed, are uniformly below the railroads’ costs for similar

⁴TTX cars are flatcars leased by the railroads which hold two trailers; railroad-owned cars have a capacity of one trailer per car (R. 21). No finding could be made as to the relative percentages of traffic which would move under the proposed rates in either type of car (R. 22).

TOFC movements using Railroad-owned flatcars, and are below the TOFC costs using TTX cars for all but two of the 66 movements (R. 21, 36). However, the Commission indicated that it was not resting its decision on relative costs. Because of certain variables affecting costs and the absence of rail cost data relating to rates for all-rail boxcar service, the Commission said that it was unable to determine whether rail boxcar, TOFC, Sea-Land, or Seatrain was the lowest cost mode of transportation. The Commission further said: "We must recognize, also, that cost is only one of the elements which may appropriately be considered in passing upon the lawfulness of rates. In the exceptional circumstances here presented, other considerations, herein discussed, appear to us determinative of the issues" (R. 37).

The Commission found that the perils of ocean transport, infrequency of sailings, and transit time longer than that in rail TOFC service are factors in both Sea-Land and Seatrain Service (R. 11, 13, 27-28); that, by reason of these factors, Seatrain offers a lower-quality service than TOFC (R. 25-27); that there is no indication that Sea-Land has moved any traffic at rates as high as competing rail boxcar or TOFC rates (R. 22, 34); that most shippers prefer railroad service to Sea-Land and Seatrain, which must accordingly maintain rates lower than those of the rail carriers (*ibid.*). It also found that all of the water carriers' service is subject to rail competition while, for the railroads, the competitive traffic is only a small portion of their total traffic. Therefore, the Commission held, if the lower rates which the water

carriers are competitively required to maintain are reduced to a point which fails to yield operating costs plus a reasonable return on investment, their operations will become unprofitable and their continuance will be jeopardized (R. 35). Finally, the Commission found that the "reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence, of the coastwise water-carrier industry generally" (R. 38). The Commission made no finding, however, as to whether reductions in the water carriers' rates to reinstate the differential wiped out by the railroad rate reductions would make the water rates unprofitable. Nor did it find whether the water carriers' rates on the particular traffic involved here should yield more than cost plus a reasonable return on investment in order to compensate for the carriage of other and less remunerative traffic.

Turning to the statutory criteria, the Commission cited Section 15a(3), as prohibiting the maintenance of a carrier's rates at a particular level in order to protect the traffic of another mode of transportation. It noted, however, that this prohibition is qualified by the words "giving due consideration to the objectives of the national transportation policy declared in this Act" (R. 37).

The Commission observed (R. 38-41) that the importance of coastwise shipping for national defense purposes has been repeatedly emphasized by various governmental agencies (citing a published statement of the Maritime Administration and a Senate Com-

mittee report) and that it is an integral element of the national transportation system (citing ICC decisions and shipper evidence that at lower rates the water carriers will attract traffic). The Commission reasoned, moreover, that Sections 305(c) and 307(d) of the Act, 49 U.S.C. 905(c), 907(d) are indicative of a Congressional intent to accord an essential and efficiently operated water carrier an "advantage in the form of lower rates", where this was necessary to enable it "to participate in the economical movement of traffic" (R. 40).

The Commission concluded (R. 41):

In the circumstances presented here, we are of the opinion that the objectives of the national transportation policy require the establishment and maintenance of a differential relationship between the rates under investigation on Sea-land and Seatrains service, on the one hand, and the rates of the rail carriers, on the other, which will allow these water carriers operating in the coastwise trade to maintain rates that will enable them to continue efficient and economical coastwise service.

While it considered the 10 per cent differential sought by Sea-Land to be excessive, the Commission stated that, in its judgment, the TOFC rates at issue should be held at 6 per cent above Sea-Land's rates so long as the latter are not increased above their present levels (R. 41-42). Accordingly, the Commission found that the proposed TOFC rate reductions were not shown to be just and reasonable and directed their cancellation without prejudice to the filing of new schedules in conformity with the Commission's conclusions (R. 42).

Three Commissioners dissented and urged that the record did not support a rate differential to protect the water carriers involved (R. 43-45). One Commissioner concurred in part, stating that he would approve all compensatory rates without imposing a differential (R. 43).

3. THE DISTRICT COURT'S DECISION

On February 1, 1961, the railroads filed their complaint in the district court seeking to set aside the Commission's order to the extent that it required cancellation of the proposed TOFC rates. Sea-Land and Seatrain intervened to defend the order. On November 15, 1961, the three-judge court rendered its opinion, holding that the order requiring cancellation of the TOFC rates should be set aside and that the Commission should be enjoined from cancelling TOFC rates which return the fully distributed costs of carriage (R. 258).

The court held that to require a differential between rail and water rates merely for the protection of the water carriers would be a violation of Section 15a(3), and that the National Transportation Policy did not warrant a different conclusion on this record (R. 246-247). It stated that a carrier's rates cannot be held to be "a destructive competitive practice", even though they threaten the existence of a competitor, unless they are (a) so low as to be hurtful to the proponent as well as its competitor; or (b) so low as to deprive the competitor of the "inherent advantage" of being the long-run lower-cost mode of transportation (R. 251-252). Although the Commission opinion did not so indicate, the court expressed

the belief that the Commission's action in keeping the railroad rates above fully distributed costs was an attempt to preserve a "value-of-service" ratemaking structure, *i.e.*, that Sea-Land's rates were being maintained above fully distributed costs on high-value goods in order to compensate for its failure to recover such costs on other traffic (R. 252-253). The court held that if the decision were based on such a theory it "must fall for lack of evidence and necessary findings" that Sea-Land's "overall rate structure" was that of the overall low-cost mode" (R. 255).⁵

Finally, the court held that the national defense clause of the National Transportation Policy was merely a "hoped-for 'end'", not an "operative policy," and that, in any event, the Commission's finding that the proposed rail rates would be inconsistent with the national defense was not supported by the evidence (R. 256-257).

SUMMARY OF ARGUMENT

1. Section 15a(3) of the Interstate Commerce Act presents an ambivalent mandate. Insofar as it prohibits the Commission from maintaining the rates of one carrier at a particular level in order to protect a competing mode of transportation, it proclaims a

⁵ The court further stated that, even with respect to traffic for which water is the low-cost mode of carriage, the Commission may disallow TOFC rates covering the railroads' fully distributed costs only if a water rate in excess of the water carriers' fully distributed costs should be maintained to compensate for their carriage of other traffic (for which water is also the low-cost mode) at less profitable rates, and in no event, said the court, may the Commission reject a TOFC rate for a particular movement on which TOFC is the low-cost mode, which covers the railroads' fully distributed costs (R. 258, 259).

policy of free competition. On the other hand, insofar as it qualifies that prohibition by admonishing the Commission to give due consideration to the objectives of the National Transportation Policy, it looks (at least in some degree) in the direction of protectionism. The problem is one of accommodation.

In cancelling the proposed TOFC rates, the Commission relied upon two of the policy factors embodied in the National Transportation Policy: the prohibition of "destructive competitive practices" and the "needs of the commerce * * * and of the national defense." The Commission apparently reached the conclusion that the proposed reductions would constitute a destructive practice forbidden by the Act (a) without giving weight to the relative costs of the two competing forms of carriage; (b) despite a finding that nearly all of the proposed rates exceeded the out-of-pocket costs, and many the fully distributed costs, of the service; and (c) on the ground that the water carriers needed lower rates than the railroads if they were to overcome the handicap of inferior service and attract a "fair share" of the traffic. We agree with the district court that the Commission's order, to the extent that it relied upon the presence of destructive practices, cannot stand. For if Section 15a(3) means anything, it must mean that the Commission is without power to impose a rate differential which bears no relationship to the comparative costs of the two modes, merely to shield the less economical carrier from the normal incidents of competition.

The legislative history, we think, bears out the district court's conclusion that (apart from considera-

tions of commerce and national defense) the prohibition against umbrella rate-making was intended to be relaxed only when necessary to preserve the inherent advantage of a competing low-cost carrier; and that the "destructive competitive practices" forbidden by the National Transportation Policy are those condemned by their predatory character (*e.g.*, rates below out-of-pocket costs) and those which, though perhaps "compensatory," would erode the inherent advantage of a competitor. Adopted in 1958, the amendment represented a compromise between a bill advanced by the railroads which would have precluded the Commission absolutely from considering the effect of a proposed rate upon a competing mode of transportation, and recommendations of the motor and water carriers, as well as the Commission itself, urging that no new legislative restrictions at all be imposed upon the exercise of the Commission's minimum rate power. Although the Senate Commerce Committee expressly rejected the extreme proposal of the railroads—known as the "three shall-nots"—it made clear, nonetheless, that the chief objective of the amendment was to encourage competitive rate-making in the transportation industry and to insure that each mode of carriage would be free to assert its inherent advantages of cost or service.

The legislative history indicates further that the primary purpose of the qualifying provision—referring to the National Transportation Policy—was to meet the objection that otherwise the Commission would be disabled from dealing with rates which were predatory or destructive in the sense that they would

undermine the inherent advantages of competing media rather than assert legitimately the advantages of the rate proponent. Particularly influential was the testimony of Chairman Freas of the Commission before the Senate Commerce Committee, in which he repeatedly focused attention upon the railroads' historic practice of cutting selected rates to levels which—though slightly above out-of-pocket costs—were well below fully distributed costs and consequently inhibited lower-cost competitors from charging a rate which at once reflected inherent advantage and yielded fair return. To remove any doubt as to the power of the Commission to condemn such practices, Chairman Freas suggested language which would have qualified the ban on umbrella ratemaking by instructing the Commission to give due consideration “to the inherent cost and service advantages of the respective carriers.” Although the Committee, and later Congress as a whole, formulated the qualification in terms of the National Transportation Policy, rather than “inherent advantages,” there is little doubt that their main purpose was to meet the problem raised by Chairman Freas. We conclude, therefore, that the district court was correct in holding that, in the absence of a finding that the water carriers were the low-cost mode on the particular movements involved, the Commission was not entitled to disturb the proposed railroad rates.

2. Although the Commission declared itself unable to determine where the inherent advantages lay as to any of the rates in controversy, and held that considerations other than relative costs were dispositive, it did state that Sea-Land's ~~costs~~ ^{costs} were lower than those of

the corresponding TOFC ^{Costs} ~~rates~~ for virtually all of the movements involved. However, even if that statement were deemed to constitute a "finding" that Sea-Land was the low-cost mode, it would still not sustain the Commission's cancellation of those ~~TOFC~~ rates (the only rates now in issue) which exceeded the rail road's fully distributed costs. To warrant protective action, it must be shown not only that the competing carrier possesses an inherent cost advantage, but also that this advantage would be impaired by the proponent's rate.

Such impairment occurs, we submit, when the low-cost carrier is unable to fix a rate which (a) covers its fully distributed costs and (b) affords it a rate advantage^o (as against the high-cost carrier) which is no less than the cost differential (measured in terms of fully distributed costs) between the two modes. A rate which exceeds the fully distributed costs of the high-cost carrier cannot place a competitor in this predicament and therefore, in ordinary circumstances, cannot be deemed "destructive." That the Commission should not ordinarily be permitted to disallow a fully compensatory rate was brought out in the congressional debates on Section 15a(3).

In some instances, perhaps, the low-cost mode might require for particular movements a rate significantly higher than fully distributed cost in order to offset deficits on other freight which will not move at a fully compensatory rate; in such cases it might be appropriate to maintain a cost-justified rate differential at a higher level than would otherwise be warranted. But the Commission made no findings that

there was need to subsidize the movement of other traffic here.

If it should turn out that Sea-Land, because of its inferior service, were unable to attract substantial business at a differential which no more than reflected its inherent cost advantage, the railroads' ability to provide a better overall bargain, cost and service considered together, would be an inherent advantage to which the public is entitled and which the National Transportation Policy admonishes the Commission to protect, whatever may be the consequences to the water carriers.

3. The district court erred, we believe, in holding that national defense requirements could not independently sustain the Commission's order because defense is mentioned in the National Transportation Policy—not as an operative policy factor, but merely as the hoped-for “end” of the operative policy factors previously enumerated. While the primary purpose of Congress in qualifying the basic prohibition in Section 15a(3) was to preserve “inherent advantages,” it is significant that Congress chose not to accept language proposed by the Commission, which would have expressed the qualification in terms of the inherent-advantage factor alone, and instead adopted the broader reference to the National Transportation Policy as a whole. In some instances, for example, a carrier which lacks any widely demanded economic advantage and cannot attract enough business to operate at a profit may yet be uniquely equipped to perform a service vital to the military establishment or possess facilities of great potential importance in the event

of a national emergency. In such circumstances, the prohibition against umbrella rate-making might properly be subordinated to the requirements of national defense. To warrant such action, however, it must be demonstrated that the proposed rate genuinely threatens to destroy a competing mode of transportation and, moreover, that the threatened mode is able to fill a vital national defense need which could not be adequately filled by any other available form of carriage. Such evidence must relate to the specific carrier which seeks protection and should set forth with particularity the reasons why the survival of this carrier is important to the national defense. Since we do not believe the evidence and findings of the Commission here met these standards, we agree that its order was properly vacated. At the same time, we urge that the district court's interpretation of this aspect of the National Transportation Policy is unduly restrictive and that the Commission, upon remand, should have greater latitude than the opinion below would permit.

ARGUMENT

Section 15a(3) of the Act (Appendix, *infra*, pp. 53-54), adopted in 1958 after three years of controversy, represented a compromise between the proposals advanced by the railroads, which would have precluded the Commission from even considering the effect of a rate on a competing mode of transportation and the recommendations of the motor and water carrier, as well as the Commission itself, urging that existing law be left unchanged. The chief thrust of the amendment, as the committee reports confirm, was to encourage competitive ratemaking among the different

modes of carriage. H. Rep. 1922, 85th Cong., 2d Sess., p. 15; S. Rep. 1647, 85th Cong., 2d Sess., p. 3. To that end, Section 15a(3) provides that in fixing minimum rates where there is intermodal competition, the Commission "shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable"; and that "[r]ates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation." However, engrafted upon this mandate was the qualification that the Commission give "due consideration to the objectives of the national transportation policy declared in this Act." That policy (Appendix, *infra*, p. 51) admonishes the Commission to recognize and preserve "the inherent advantage" of each mode, to encourage the establishment of reasonable rates without unjust discriminations or "unfair or destructive competitive practices," and to "foster sound economic conditions * * * among the several carriers"—"all to the end of developing, coordinating, and preserving a national transportation system * * * adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

The Commission's decision in this case rested, in part, on the importance of the coastwise water carriers to the national defense and commerce. As a further ground for its action, however, the Commission appears to have concluded that the proposed railroad rate reductions would constitute a "destructive competitive practice" within the meaning of the Na-

tional Transportation Policy.⁶ It reached this conclusion (a) without regard to the relative costs of the two competing modes of transportation;⁷ and (b) despite a finding that almost all the rail rates in issue covered the out-of-pocket costs, and many of the fully distributed costs, of carriage. The mere fact that the proposed rates would eliminate the differential needed by the water carriers in order to overcome the handicap of inferior service, and thus attract a "fair share" of the traffic, was apparently deemed by the Commission a sufficient basis for cancelling them.

In setting aside the order, the district court held that the prohibition against compulsory rate differentials in Section 15a(3) was intended to be qualified only by the "inherent advantages" and "destructive

⁶ Thus, the Commission, after noting that all of the rates involved here (with a few exceptions) were compensatory, stated that "[t]he next, and the most important, question is whether these rates constitute destructive competition" (R. 34). And, later, the Commission declared that: "The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence, of the coastwise water-carrier industry generally" (R. 38). See, moreover, the court's characterization of the Commission's opinion (R. 249).

⁷ The Commission stated that the Sea-Land costs, both out-of-pocket and fully distributed, were below the restated TOFC costs for nearly all movements to which the TOFC rates would apply. However, it appeared to place no reliance upon this statement. For it also noted that "we cannot determine on these records where the inherent advantages may lie as to any of the rates in issue. We must recognize, also, that cost is only one of the elements which may appropriately be considered in passing upon the lawfulness of rates. In the exceptional circumstances here presented, other considerations, herein discussed, appear to us determinative of the issues" (R. 36-37).

competitive practices" factors of the National Transportation Policy (R. 252), and that the Commission's reliance upon national defense considerations was therefore misplaced. Furthermore, it regarded these qualifying factors as interrelated concepts, a destructively competitive rate being defined, in effect, as one which, if compensatory at all (*i.e.*, above out-of-pocket costs), nevertheless fails to cover fully distributed costs and thereby deprives a competing carrier of the "inherent advantage" of being the low-cost mode (R. 251-252). In the court's view, however, a rate which merely reflects a proponent's competitive superiority is not to be disturbed by the Commission even though its effect might be to render obsolete a competing mode of transportation.

Although the United States supported the Commission's order in the district court, we are persuaded that the cause should be remanded to the Commission. At the same time, we do not agree in all respects with the terms of the district court's remand.

Contrary to the decision below, we urge that the overriding requirements of national defense would justify the Commission, upon proper findings and evidence, in extending minimum-rate protection to a carrier which lacked any inherent advantage and which was not the victim of a forbidden competitive practice. Although we believe that the evidence and findings here were not adequate to sustain the cancellation of these rates on national defense grounds, we submit that those grounds should be left open to the Commission upon remand.

In the absence of national defense considerations, however, we agree with the district court that the Act

does not empower the Commission to impose rate differentials between competing modes of transportation merely to shield the less economical carrier from the normal incidents of competition or to assure it a "fair share" of the traffic. The paternalistic regulatory philosophy reflected in the Commission's decision here is fundamentally at odds with the policy of free competition Congress proclaimed in Section 15a(3). That Section, as qualified by the National Transportation Policy, tolerates the imposition of rate differentials only to the extent justified by relative costs and (subject to the qualification noted *infra*, pp. 41-42) at levels no higher than necessary to enable the low-cost carrier to recover its fully distributed costs for the service in question.⁸

⁸ In the court below the United States asserted that the selective character of the rate reductions at issue, which were instituted only on routes where the railroads face water competition, provided a further basis for their cancellation by the Commission as unfair or destructive competitive practices. Upon further consideration, we no longer adhere to that position. The Commerce Act itself provides relief against those rate discriminations which result in secondary-line competitive injury (*i.e.*, to shippers), specifically foreclosing consideration of injury to competitors of the carrier in terms of discrimination (see 49 U.S.C. 2, 3, and comparable provisions under Parts II, III, and IV). This Court has consistently held, moreover, that selective rate reductions to meet competition may be permissible under the Act. *E.g.*, *Texas & Pac. R. Co. v. Interstate Commerce Commission*, 162 U.S. 197; *Interstate Commerce Commission v. Alabama Midland Ry.*, 168 U.S. 144, 164; *Interstate Commerce Commission v. Chicago G.W. Ry.*, 209 U.S. 108. As a recent congressional staff study observed, "freedom to make spot rates of this type is historic" (*National Transportation Policy*, Preliminary Draft of a Report Prepared for the Senate Interstate and Foreign Commerce Com-

A CARRIER'S RATES MAY NOT BE HELD UP TO A PARTICULAR LEVEL MERELY BECAUSE THEY THREATEN THE TRAFFIC, REVENUES OR EVEN THE CONTINUED EXISTENCE OF A COMPETING MODE OF TRANSPORTATION. TO WARRANT A PROHIBITION OF RATE REDUCTIONS ON ECONOMIC GROUNDS, IT MUST BE ESTABLISHED THAT THE COMPETING MODE HAS INHERENT ADVANTAGES WHICH WOULD BE IMPAIRED OR DESTROYED

A. The Legislative History of Section 15a(3) Shows That the Commission May Impose Rate Differentials between Competing Modes of Transportation only when This is a Necessary Means of Preserving the Inherent Advantages of the Respective Carriers

1. The power to prescribe minimum railroad rates was conferred upon the Commission by the Transportation Act of 1920, 41 Stat. 456, 484, amending Section 15(1) of the Interstate Commerce Act, 49 U.S.C. 15(1). Whereas Congress had previously directed its efforts to the prevention of abuses, particularly those stemming from excessive or discriminatory rates, its purpose in the 1920 legislation was to foster a more adequate transportation service and, in particular, to give the Commission power to ensure that carriers received a fair return on their capital. *The New England Divisions Case*, 261 U.S. 184, 190. With the advent of motor carrier regulation in 1935 and water

mittee by the Special Study Group on Transportation Policies in the United States, 87th Cong., 1st Sess., p. 429). Regardless of the wisdom of terminating this freedom (see a recent bill to that end, S. 3578, 86th Cong., 2d Sess.), we do not believe it can be impaired under present law except under the principles suggested in this brief.

carrier regulation in 1940, the minimum rate power took on added significance.⁹ It became one of the primary tools with which the Commission sought to implement the National Transportation Policy declared by Congress in the Transportation Act of 1940, 54 Stat. 899, which, in the words of this Court:

* * * while intended to secure the lowest rates consistent with adequate and efficient service and to preserve within the limits of the policy the inherent advantages of each mode of transportation, at the same time was designed to eliminate destructive competition not only within each form but also between or among the different forms of carriage.

Eastern-Central Motor Carriers Ass'n v. United States, 321 U.S. 194, 206.¹⁰

Side by side with the National Transportation Policy, however, Congress developed another set of principles to guide the Commission in fixing rates. In the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 220, it amended the statement of general regulatory objectives contained in Section 15a(2)

⁹ The minimum rate provisions in Part II of the Commerce Act (motor carriers), Part III (water carriers), and Part IV (freight forwarders) are found in Sections 216(e), 307(b), and 406(b) of the Act.

¹⁰ The importance of the minimum rate power in carrying out these objectives was stressed by the Commission in 1939, when it told the Senate Commerce Committee that "[t]hose who urge equal or impartial regulation of all important forms of transportation lay particular stress upon the need for curbing destructive competition by the fixing of minimum reasonable rates" (Hearings on the Omnibus Transportation Bill before the House Interstate and Foreign Commerce Committee, 76th Cong., 1st Sess., p. 1560).

(which had been added by the 1920 Act, 41 Stat. 488) to direct the Commission to consider "the effect of rates on the movement of traffic."¹¹ The Transportation Act of 1940, 54 Stat. 899, 912, expanded upon this provision by requiring the Commission to take into account "the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed" (Appendix, *infra*, p. 53). The import of this change was to make clear that "no carrier should be required to maintain rates which would be unreasonable, judged by other standards, for the purpose of protecting the traffic of a competitor" (*Seatrail Lines, Inc. v. Akron, C. & Y. Ry. Co.*, 243 I.C.C. 199, 214, 215). It was in response to criticism, chiefly by the railroads, that the Commission had not adhered consistently to the rule of Section 15a(2), but had sought instead to shield carriers from competition^{11a} (see *infra*, p. 31), that Congress in 1958 added Section 15a(3).

2. The initial impetus for the legislation which resulted in Section 15a(3) came from a 1955 report entitled *Revision of Federal Transportation Policy*, issued by the President's Advisory Committee on Transport Policy and Organization, under the chairmanship of the Secretary of Commerce. Finding that regulatory policy was urgently in need of revision if the transportation industry was to maintain itself at

¹¹ Comparable provisions apply to motor carriers (49 U.S.C. 316(i)), water carriers (49 U.S.C. 907(f)) and freight forwarders (49 U.S.C. 1006(d)).

^{11a} For a discussion of the cases in which the Commission was said to have deviated from the rule of Section 15a(2), see Hearings on S. 3778 before the Senate Interstate and Foreign Commerce Committee, 85th Cong., 2d Sess., pp. 86-91.

maximum effectiveness, the report recommended increased reliance on competitive forces in rate-making, maintenance of a modernized and financially strong common carrier system, more efficient and economical management so as to provide the consumer the lowest possible transportation costs, and development of an effective transportation system for defense mobilization or war. Legislation designed to implement these objectives was drafted by the Secretary of Commerce, H.R. 6141, 84th Cong., 2d Sess. It would have revised the National Transportation Policy by eliminating the prohibition against "unfair or destructive competitive practices," and would have amended Section 15a(1) to provide that:

Sec. 15a. (1) In determining whether a rate, fare, or charge, or classification, regulation, or practice to be applied in connection therewith, results in a charge which is less than a reasonable minimum charge, as used in this Act, the Commission shall not consider the effect of such charge on the traffic of any other mode of transportation; or the relation of such charge to the charge of any other mode of transportation; or whether such charge is lower than necessary to meet the competition of any other mode of transportation: *Provided, however,* That the provisions of this paragraph shall not be construed to prohibit any carrier subject to this Act from protesting or complaining in the event that a rate, fare, or charge is filed or made effective which it believes to be less than a reasonable minimum charge.

This proposal, known as "the three shall-nots," was vigorously supported by the railroads, which argued

that the Commission, in mistaken reliance on the prohibition against "unfair or destructive competitive practices," had undertaken to apportion traffic among the several forms of transportation according to "fair shares" and had rejected even compensatory rail rates on the ground that they would divert from other carriers their allotted share of the traffic. Adoption of the three shall-nots was urged (either as an amendment to Section 15a(1) or in the form of a new Section 15a(3)) in order to restrict the scope of the Commission's inquiry to the question whether a competitive rate was reasonable *per se* and nondiscriminatory, thus in effect limiting the concept of "unfair or destructive competitive practices" to noncompensatory rates. Hearings on H.R. 6141 before the Subcommittee on Transportation and Communications of the House Interstate and Foreign Commerce Committee, 84th Cong., 2d Sess., pp. 532, 537, 540, 548.

The Commission opposed the bill as "inimical to the maintenance of a sound transportation system." It pointed out that since the railroads viewed as compensatory any rate which exceeded out-of-pocket costs, even if it did not cover fully distributed costs, a rate might be "compensatory," yet at the same time enable the railroads to drive out of business a competing carrier with lower full costs, to the ultimate detriment of the public at large which would then be subjected to higher rates. *Id.* at 1768.

Although H.R. 6141 died in committee upon the adjournment of the 84th Congress, the railroads' alternative proposal for a new Section 15a(3) incorporating the three shall-nots was again introduced in

the 85th Congress as H.R. 5523. As before, the railroads made plain that the "underlying purpose" of their bill was to allow them to make competitive rates "without regard to their effect (if any) upon competing modes of transportation." Hearings on Surface Transportation (Ratemaking Legislation) before a subcommittee of the House Interstate and Foreign Commerce Committee, 85th Cong., 1st Sess., pp. 5, 199. The Commission renewed its opposition (*id.* at 46, et seq.).

The railroads' proposal was explicitly rejected by a subcommittee of the Senate Commerce Committee, headed by Senator Smathers, which, after extended hearings in the early part of 1958, recommended instead the enactment of a new Section 15a(3) to provide:

In a proceeding involving competition with another mode of transportation, the Commission, in determining whether a rail rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by railroad and not by such other mode.

Although the final phrase of the bill was reminiscent of the three shall-nots, it was clearly not intended to restrict the Commission's minimum rate power to the same degree as the measure advocated by the railroads, for the subcommittee expressly stated it was "not convinced that the record before it justifies approval of the railroads' proposal." Report on Problems of the Railroads of the Subcommittee on Surface Transportation of the Senate Interstate and Foreign Commerce Committee, in S. Rep. 1647, 85th Cong.,

2d Sess., pp. 7, 8, 10, 18 (hereafter referred to as "Subcommittee Report").

The full Senate Commerce Committee, which drafted the final version of Section 15a(3) (Appendix, *infra*, pp. 53-54), similarly made plain in its report that the extreme position of the railroads was not to be enacted into law. S. Rep. 1647, *supra*, at 2. The committee version, moreover, was framed largely in response to the warning of the Commission that the concluding phrase of the subcommittee's proposal—"and not by such other mode" was inconsistent with rejection of the three shall-nots. Hearings on S. 3778 Before the Senate Interstate and Foreign Commerce Committee, 85th Cong., 2d Sess., p. 166 (hereafter referred to as "Hearings"); see *infra*, pp. 32-33. The Commission left no room for doubt that its administration of the committee version, if adopted, would include examination of the effect of a rate reduction on competing modes. *Id.* at 178, 181, 183.

Significantly, Congress also rejected proposals, advanced by the Secretary of Commerce, which would have confined the Commission to a consideration of antitrust factors, rather than transportation policy, in reviewing competitive rate-making. Although the Secretary had originally sponsored the three shall-not proposal in the 84th Congress, he opposed its counterpart, H.R. 5523, in the next Congress on the ground that it would exempt the railroads from the responsibilities imposed upon the rest of industry by the antitrust laws, which require consideration of the effect of unreasonably low rates upon competition. In hearings before the subcommittee, the Secretary

suggested language parallel to the Clayton and Robinson-Patman Acts (15 U.S.C. 13-18); under which the Commission might take into account the impact of a rate on competition "only where its effect might be substantially to lessen competition or tend to create a monopoly in the transportation industry or where the rate was established for the purpose of eliminating or injuring a competitor." Hearings on Problems of the Railroads before the Subcommittee on Surface Transportation of the Senate Interstate and Foreign Commerce Committee, 85th Cong., 2d Sess., p. 2353. Later, before the full Commerce Committee, the Secretary again urged the encouragement of competition to the extent possible. He proposed a new Section 15a(3), cast in Sherman Act language, which would allow the Commission, in determining whether proposed rail rates are too low, to consider only whether such rates will "unreasonably restrain trade or commerce" or are part of a monopolization or attempt to monopolize. Such a condition, it was stated, "would prohibit price reductions only when they constituted predatory practices which threatened the existence of the competitive system itself." Hearings, *supra*, at 198, 199. The Secretary's proposals received virtually no mention during the pendency of Section 15a(3) before Congress.¹¹

¹¹ The only explicit reference is in the individual views of Senator Lausche, appended to the subcommittee report. While concurring in the proposed addition to Section 15a, he "recognize[d] that strong arguments can be made that the subcommittee should have gone further and followed the [Clayton Act] suggestions made by the Secretary of Commerce on the subject" (Subcommittee Report, *supra*, at 28). The majority

It is clear, therefore, that Section 15a(3) was not intended to preclude the Commission from considering, in terms of national transportation policy, the effect of reduced rates on competing modes of carriage.

3. Nevertheless, the most significant feature of Section 15a(3) is its prohibition against holding up the rates of one mode to protect another, expressing the congressional intent to encourage competition in the public interest. The legislative history indicates further that the primary purpose of the qualifying provision—referring to the National Transportation Policy—was to meet the objection that otherwise the Commission would be disabled from dealing with rates which were predatory, or destructive in the sense that they would undermine the inherent advantages of competing media rather than assert legitimately the advantages of the rate proponent.

The railroads had urged, in support of the three shall-nots, that their inherent advantage of low cost should be made available to the shipping public. While rejecting the railroads' proposal in favor of its own draft (*supra*, p. 27), the subcommittee proclaimed as its policy, and the policy of Congress, "that each form of transportation should have opportunity to make rates reflecting the different inherent advantages each has to offer so that in every case the public may exercise its choice, cost and service both con-

characterized this as a belief "that the amendment recommended does not give sufficient freedom for making competitive rates" (*id.* at 18-19). Senator Lausche later concurred in the Committee recommendation.

sidered, in the light of the particular transportation task to be performed." It added, however, that "such rate-making should be regulated by the Commission to prevent unfair destructive practices on the part of any carrier or group of carriers." Pointing out that the Commission had not consistently adhered to the "inherent advantage" principle, the subcommittee report stated that the purpose of amending Section 15a was to "admonish the Commission to be consistent in following the policy" it had enunciated in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 538, where it found no warrant for believing that the rates of one mode should be held up to preserve another.¹² Finally, the subcommittee quoted with approval the following language of this Court in *Schaffer Transportation Co. v. United States*, 355 U.S. 83:

¹² In *New Automobiles*, the Commission had approved reduced rail rates protested by motor carriers for the carriage of automobiles. In its report, the Senate subcommittee quoted the Commission statement (259 I.C.C. at 538) that in enacting "separately stated rate-making rules for each transport agency, [Congress] obviously intended that the rates of each such agency should be determined by [the Commission] in each case according to the facts and circumstances attending the movement of the traffic by that agency. In other words, there appears no warrant for believing that rail rates, for example, should be held up to a particular level to preserve a motor-rate structure * * *." The subcommittee declared its intention "to affirm the interpretation of the Commission given in the *Automobile* case epitomized in the words quoted above," which had "properly construed the intent of Congress" that "the Commission consistently follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of service or of cost" (Subcommittee Report, *supra*, at p. 3).

To reject a motor carrier's application on the bare conclusion that existing rail service can move the available traffic, without regard to the inherent advantages of the proposed service, would give one mode of transportation unwarranted protection from competition from others.

* * * * *

The ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of "inherent advantage" that the congressional policy requires the Commission to recognize.

S. Rep. No. 1647, *supra*, at 18-19.

The subcommittee amendment was the subject of extended testimony in hearings conducted by the full Senate Commerce Committee in May 1958. Chairman Freas, testifying on behalf of the Commission, expressed full agreement with the principles set forth in the subcommittee report, stressed the wisdom of protecting the inherent advantages of each mode (Hearings, *supra*, at 167, 171), and noted that except for its concluding phrase—"and not by such other mode"—the subcommittee proposal was substantially equivalent to Section 15a(2) as it then stood (*id.* at 166-167). The Chairman cautioned, however, that the quoted phrase was inconsistent with the subcommittee's stated objective of preventing unfair destructive practices, since these could not be ascertained without examining the effect of a rate on competing forms of transportation (*id.* at 167-168). Along the same lines, he observed that while a purpose of rate regulation should be to encourage the flow of traffic by the most economical means, this means could not

be identified without considering the circumstances attending the movement of traffic by transportation modes other than the one proposing the rate (*id.* at 168). The uncertain purpose of the amendment, he warned, would enable the railroads to argue that they were intended to have complete freedom, in the face of competition from another mode, to establish rates which merely covered out-of-pocket costs (*id.* at 167).

Chairman Freas then urged that the "real questions" presented by the amendment, on which Congress should make its intention unmistakably clear, were the following:

(1) *"whether Congress desires to give to the high-cost carrier in every competitive rate situation complete discretion to establish any rates which cover its out-of-pocket costs without regard to its effect upon the ability of the low cost carriers to move the particular traffic at rates which cover all of their cost, and (2) whether and to what extent Congress desires to prohibit the maintenance of minimum rates on high value commodities at a level higher than would be justified by cost considerations alone. [Emphasis added.]*

The crux of the first problem, as the Chairman saw it, was that while transportation should, circumstances permitting, return the full cost of performing the service, in many instances the full cost of the low-cost mode exceeds the out-of-pocket cost of another. "If, then," he said "we are required to accept the rates of the high cost carrier merely because they exceed its out-of-pocket costs, we see no way of preserving the inherent advantages of the low

cost carrier. "In any event, that other mode would be compelled to depress its rates below full costs in order to preserve its inherent advantages against the high cost form of transportation" (*id.* at 168).

The same point—*i.e.*, that a rate might be "compensatory" in the sense of covering out-of-pocket costs and yet infringe upon the inherent advantage of a more economical carrier—was reemphasized later in the Chairman's testimony when he explained that the lawfulness of a challenged rate deduction (*id.* at 172)—

depends in each instance on which form of transportation is the low-cost form * * *

Now, if it is a case where the railroad is a low-cost form of transportation, again, there is no objection to be made to that. But if the railroad is the high-cost form of transportation, I do not think that the fact that the railroad would get 50 cents a ton or 21½ cents a hundred pounds [above out-of-pocket costs] out of that traffic would override the interest of the general public in being able to have that same traffic hauled by the low-cost form of transportation at possibly a lower rate and at a full profit to the other form of transportation merely—rather than just 21½ cents above the out-of-pocket cost.¹³

Presumably to remedy the ambiguity of the subcommittee's draft as it related to these problems, the

¹³ See also colloquy between Senators Smathers and Kefauver, 104 Cong. Rec. 10858-10859, in which Senator Smathers apparently agreed that the amendment would prohibit a rate which, by failing to return full costs, would infringe the inherent advantage of a competing lower-cost mode.

Chairman proposed (*id.* at 169) the following substitute:

In a proceeding involving competition between carriers, the Commission, in determining whether a proposed rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic. Rates of a carrier shall not be held up to a particular level to protect the traffic of a less economic carrier, giving due consideration to the inherent cost and service advantages of the respective carriers.

Senator Smathers suggested that the Commission's objections could be met by adding to the subcommittee's language "that the Commission will always, should always have the right to consider whether an application for a rate falls within * * * the purview of unfair destructive rate practice" (*id.* at 170). He also intimated that the controversial concluding phrase of the subcommittee proposal ("and not by such other mode") might well be overridden by the national transportation policy even without any express qualification (*id.* at 177). When the Chairman expressed doubt on these questions, Senator Smathers proposed the addition to the subcommittee proposal of a direction that the Commission "always [keep] * * * in mind the provision of the national transportation policy which the Congress approved in 1940 and reaffirms here now" (*ibid.*). Senator Potter, who was a member of the full Committee, but not of the subcommittee, suggested the adoption of Senator Smathers' new phrase and the deletion of the phrase "and not by such other mode," and Chairman Freas indicated that this revision would be acceptable (*ibid.*).

Other witnesses also objected to the subcommittee bill, chiefly on the ground that it will allow the railroads, by reducing their rates below a fully compensatory level, to overcome the inherent cost advantages of competing modes. For example, John L. Weller, testifying on behalf of Seatrain Lines and Pan-Atlantic Steamship Corp. (now Sea-Land) replied as follows to a question by Senator Potter:

Senator POTTER. * * * You want to have the inherent advantages of water transportation protected, so that unfair competition can't move you out of your traffic; is that right?

Mr. WELLER. That is right, Senator. I want no more than what is fair.

As I explained, our kind of operation can only exist with a differential under the railroad rates; that is No. 1. We are not entitled to have such a differential, nor do I urge one, except in the case where cost is lower than the railroad cost. We have no right to ask for anything more than that. But if we are to be exposed to rate-cutting practices by the railroads, for instance, in which the railroads are going to cut their rates on an out-of-pocket cost basis and to subject me at the same time to local rates which put me in a squeeze, obviously we cannot continue in business. * * * [*id.*, at 30].

See also testimony of A. C. Ingersoll, Jr., representing the barge lines (*id.* at 107).

Despite the distinctions between the subcommittee proposal and that of the full Commerce Committee, the committee report made plain that there was no fundamental change in objective. The committee re-

produced and expressly approved almost the entire discussion of competitive ratemaking in the subcommittee report (S. Rep. 1647, *supra*, at 2). It then described its new proposal as "designed to encourage competition * * * by allowing each form of transportation * * * full opportunity to make rates reflecting the inherent advantages each has to offer * * *" (*id.* at 3), and stated that such ratemaking would be "regulated by the Interstate Commerce Commission * * * to prevent 'unfair or destructive competitive practices' as contemplated by the declaration of national transportation policy" (*id.* at 3; see the parallel statement of the subcommittee, *supra*, p. 30). According to the committee, the effect of its proposal would be to put "the principal emphasis, but not the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation * * * on the conditions surrounding the movement of the traffic by the mode to which the rate applies" (*id.* at 3-4).

The House view of Section 15a(3) paralleled that of the Senate. The House Commerce Committee report on H.R. 12832, which embodied the Senate Committee version, restated almost verbatim the approval accorded by both Senate reports to *New Automobiles* and *Schaffer Transportation Co. v. United States* (H. Rep. 1922, 85th Cong., 2d Sess., pp. 13-14); exhorted the Commission to "follow the principle of allowing each mode of transportation to assert its inherent advantages"; and declared that "the effect of this amendment will be to encourage competition between the different modes of transportation for the benefit of

the shipping public," thereby providing "a guide to the Commission in achieving consistency in its treatment of competitive rate cases" and ending the agency's vacillation between the *New Automobiles* philosophy and paternalism (*id.* at 14-15).

The purpose of Congress to protect the inherent advantages of all competing modes of transportation was repeatedly manifested in the debates on Section 15a(3). Senators Schoeppel (104 Cong. Rec. 10817), Lausche (*id.* at 10822, 10842, 10859), and Potter (*id.* at 10842), all members of the subcommittee which had considered earlier versions, made plain that this was their intent, as did Senator Bricker (*id.* at 10842). Similar views were expressed by Representative Harris (*id.* at 12531) and various members of his House Commerce Committee (*id.* at 12524, 12531-12532, 12536).

The foregoing account makes clear, we think, that it was not the intent of Congress to give the Commission with one hand what it had taken away with the other—namely, the power to act as a "giant handicapper,"¹⁴ establishing whatever differentials might be necessary to equalize the race, or at least assure that no runner would drop out. Instead, its purpose was a limited one: to make certain that price reductions to less than fully compensatory levels—which, in the hearings and debates were referred to as "destructive competitive practices"¹⁵—would not obliterate the natural cost advantage enjoyed by a competing form of

¹⁴ See Hearings, *supra*, at 82.

¹⁵ See *id.* at 170, 176-177; 104 Cong. Rec. 10859, 12531-12532.

carriage. It follows, we think, that in the absence of a finding that the water carriers were the low-cost mode on the movements to which the proposed TOFC rates applied, the Commission was without authority to cancel those rates, whether or not they exceeded fully distributed costs. Moreover, as we now show, even if the Commission be deemed to have made a finding that Sea-Land was the low-cost mode on this traffic, it was still not empowered to cancel the TOFC rates which were fully compensatory, at least in the absence of a finding (not in fact made), that the water carrier required rates in excess of fully distributed costs on these movements to compensate for deficits incurred in moving other traffic.

B. The Finding that a Competing Mode of Transportation Is the Low-Cost Medium on Particular Traffic Is Not of Itself Sufficient to Warrant the Cancellation of a Fully Compensatory (Though Reduced) Rate Proposed by the High-Cost Mode.

Although the Commission declared itself unable to determine where the inherent advantages lay as to the rates in controversy, and held that considerations other than relative costs were dispositive of the issues before it, it stated, nonetheless, that the Sea-Land costs, both out-of-pocket and fully distributed, were less than the corresponding costs of the railroads' TOFC service on all but two movements. (R. 36-37). The question arises, then, whether this finding—assuming it be such—was enough to justify the Commission's action in holding an umbrella over the Sea-Land rates.

We note preliminarily that, although the district court set aside the entire "order requiring cancellation of the TOFC rates," it enjoined the Commission from cancelling on remand only those rates "which return at least the fully-distributed cost of carriage." (R. 258, 26²). Presumably, therefore, it remains open to the Commission, even without additional findings, to disallow the TOFC rates—applicable to 23 of the 66 movements by railroad-leased TTX cars and to 43 of the 66 movements by railroad-owned cars (R. 22)—which equaled or exceeded out-of-pocket costs but fell short of fully distributed costs. If the railroads were dissatisfied with the terms of the court's mandate, it was incumbent upon them to challenge those terms by a timely appeal to this Court. Since they have failed to do so, we assume that they are now precluded from raising any objection to the cancellation of the less than "fully compensatory" rates and that the disposition of those rates is not an issue before this Court. Accordingly, we shall confine our argument to those rates which would return the railroads their fully distributed costs.

The district court, we have concluded, was correct in holding that the cancellation of these rates was improper. In order to justify the disallowance of a proposed rate reduction because of its impact on a competitor, it is not enough to find that the competitor possesses an inherent cost advantage. It must also be found that the proposed rate will destroy, or at least impair, that cost advantage. Such impairment occurs, we submit, when the low-cost carrier is unable to fix a rate which (a) covers its fully distributed

costs and (b) affords it in a rate advantage (as against the high-cost carrier) which is no less than the cost differential (measured in terms of fully distributed costs) between the two modes.

Certainly, then, in ordinary circumstances, a rate which exceeds the fully distributed costs of the high-cost carrier cannot be deemed "destructive." Conceivably in some instances the low-cost mode may require for particular movements a rate significantly higher than fully distributed costs in order to offset revenue deficiencies on other freight which will not move at a fully compensatory rate; in such cases, there might be justification for maintaining a differential at levels higher than would otherwise be warranted. But the Commission made no finding here that there was a need to subsidize the movement of other traffic.¹⁶ Moreover, we do not believe that its

¹⁶ The district court's opinion does not conflict with this conclusion, although it suggests certain qualifications upon the Commission's power to engage in "value-of-service" rate-making. See note 5, p. 11, *supra*. Since, in any event, the Commission has not purported, in this case, to fix the level of the rates on the basis of a need to subsidize other forms of traffic, this issue is not presented in concrete form, and we doubt that the Court should attempt to determine abstractly the various factors which the Commission might take into account and the lengths to which it might go. The Commission has recently described the type of record which it believes adequate to sustain a decision on value-of-service grounds (*Motor Vehicles—Kansas City to Arkansas, Louisiana & Texas*, I. & S. Dkt. No. 7269, decided September 21, 1962, p. 31):

"On the other hand, there is no sufficient or specific evidence to substantiate the claim of the complainant-protestant that the rail rate structure as a whole requires that the involved automobile traffic return considerably more than fully distributed

action in cancelling these TOFC rates can be supported on the ground of forestalling an anticipated series of retaliatory rate reductions which might leave unaltered the original differential between the two modes but drive the rates down to less remunerative levels. So long as the rates remain fully compensatory, the Commission is required to stay its hand, in keeping with the express policy of the Act to provide the public "adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service." See 49 U.S.C. 15a(2).

That the Commission should not ordinarily be permitted to disallow a fully compensatory rate was brought out in the House debates on the present form of Section 15a(3). Representative Allen (a member of the House Commerce Committee, which reported the bill) attributed to the bill a purpose "to promote healthy rate competition between the different forms of carriage" by giving each mode "greater free play in establishing reduced rates if those rates are compensatory and do not discriminate unjustly among shippers," in order to "enable the public to enjoy the obvious benefits of relatively lower rates where any mode of transportation can offer such rates and still show a profit" (104 Cong. Rec. 12524). Representative Harris, Chairman of the House Committee, emphasized (*id.* at 12531) that:

if a carrier can provide a rate that is fully compensatory to the shipping public the Commis-

costs in order that the so-called low-grade deficit freight and less-carload and passenger service be subsidized, or what the particular extent of such contribution should be."

sion cannot * * * require that carrier to hold that rate up to a higher level just because it is necessary to keep another mode of transportation in business * * * [I]f a carrier can provide a rate which the Commission determines is fully compensatory to the carrier, then the shipper should have the benefit of that rate.

In the same vein, Representative O'Hara stated that the language plainly meant that if the rate is "compensatory" to the proponent, the Commission "would have to allow that competing form of transportation to charge a lower rate" (*id.* at 12536); and Representative Avery, referring to the Commission decision in *New Automobiles*, stated that while the Commission "is not required" to hold up rates merely to protect a competing mode, "[i]t is required however to only approve a rate that is fully compensatory to the common carrier for that service" (*id.* at 12538).

There is no guarantee, to be sure, that Sea-Land would be able to attract business at a differential which no more than reflected its inherent cost advantage. The Commission estimated that in order to be competitive the water carriers might require a margin approximately 6 percent below the TOFC rate for given movements (R. 41-42), and it made no finding as to whether the cost differences between the two forms of carriage were greater or less than this margin. It is conceivable that the superiority of the railroads' service—its greater speed, frequency, and dependability—would be valued more highly by a majority of shippers than the cost savings offered by

that the overriding needs of national defense (and perhaps commerce as well) might, upon an appropriate showing, warrant the exercise of the minimum rate power to preserve a threatened carrier.

We have shown *supra*, p. 30-37, that the primary purpose of Congress in qualifying the basic prohibition contained in Section 15a(3) was to make clear that the Commission would be free to prevent "destructive competitive practices" which threatened to infringe the inherent advantages of a competing mode. It is significant, however, that Congress chose not to accept the language proposed by the Commission, which would have expressed the qualification in terms of the inherent-advantage factor alone, *supra*, p. 34, but, instead, adopted the broader reference to the National Transportation Policy as a whole. We see no justification for the district court's view that the general and ultimate objectives proclaimed in the concluding clause of the Policy should be dismissed as verbal paraphernalia while only the specific policy factors previously enunciated are taken seriously. Moreover, in 1958 the National Transportation Policy had long been construed as authorizing the Commission to act on the basis of national defense requirements. *United States v. Capital Transit Co.*, 338 U.S. 286, 290; *United States v. Capital Transit Co.*, 325 U.S. 357, 361-362; *Cantlay & Tanizola, Inc. v. United States*, 115 F. Supp. 72, 80-81 (S.D. Cal.). The Commission had, indeed, developed a limited but well-established practice of relying upon the national defense clause to act in appropriate cases when no other authority was available. See, e.g., *Increased*

Common Carrier Truck Rates in the East, 42 M.C.C. 633, 650; *Novick Extension of Operations—Explosives*, 34 M.C.C. 693, 697; *Kiser and Countryman Extension of Operations*, 31 M.C.C. 127, 131. Moreover, the existence of the national defense element in the National Transportation Policy was explicitly recognized by Representative Harris during his statement on the House floor in connection with the section of the 1958 Act which followed Section 15a(3), dealing with exemption of transportation of agricultural commodities from regulation. 104 Cong. Rec. 12531-12532.

This is not, of course, to say that the broad conclusory language of the National Transportation Policy relating to national needs is to be freely applied so as to render inoperative the specific policy factors which precede it or the basic *laissez faire* philosophy expressed in Section 15a(3). If that Section means anything at all, it means that in the ordinary case of intermodal competition, the Commission should not interfere with a rate which is fully compensatory and which therefore either asserts the inherent cost advantage (if any) of the proponent or at least does not infringe upon the inherent cost advantage (if any) of the competitor. Occasionally, however, a carrier which lacks any widely demanded economic advantage and which cannot attract enough business to operate at a profit may yet be uniquely equipped to perform a service vital to the military establishment or a significant segment of commerce. An obvious example would be a carrier which could transport missiles more safely and expeditiously than

any other mode. Moreover, there may be instances in which the facilities of the uneconomical mode are of great potential importance in the event of a national emergency. This might well be true of the water carriers in the present case. In such circumstances, we submit, the prohibition against umbrella ratemaking might properly give way to the requirements of the national defense (or commerce).

The showing, however, must be more than perfunctory. It must be demonstrated, first, that the proposed rate genuinely threatens to destroy a competing mode of transportation and, secondly, that the threatened mode is able to fill a vital national defense or other public need which could not be adequately filled by any other available form of carriage. We suggest that evidence of national defense requirements might take the form of expert testimony by representatives of the government agencies operating in that area, such as the Department of Defense or the Office of Emergency Transportation in the Department of Commerce. In any event, however, the evidence must relate to the specific carrier which seeks protection and should set forth with particularity the reasons why the survival of this carrier is important to the national defense. A similar standard should apply where the Commission relies on the commerce factor. It then becomes the task of the Commission to decide whether the considerations favoring protective action outweigh the basic principles of competitive ratemaking contemplated by Section 15a(3) and the National Transportation Policy.

The findings and evidence here do not meet this test. Although the Commission concluded that the reduced TOFC rates were "an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence of the coastwise water-carrier industry generally" (R. 38), it made no specific findings to support this conclusion. In particular, it did not find whether reductions in the water carriers' rates to restore the differential which existed prior to the TOFC reductions would render the water carrier rates unprofitable. Moreover, there were neither findings nor substantial evidence as to the manner in which the national defense requires Sea-Land's survival. As indicated above, the Commission relied entirely on studies prepared by two government bodies, one of which, made in 1955, stressed the national defense role of break-bulk vessels such as Sea-Land no longer operates (*supra*, p. 4); while the other, dated 1950, merely referred in passing to the role of coastwise shipping in providing tonnage for emergency use. The Commission's suggestion of the commerce factor was similarly diffuse. We agree, therefore, with the district court that the report of the Commission fails to supply the evidence and findings required to sustain a decision on national defense (or commerce) grounds. At the same time, we urge that the district court's interpretation of this aspect of the National Transportation Policy is unduly restrictive and that the Commission, upon a remand of the case, should have greater latitude than the opinion below would permit.

CONCLUSION

The judgment of the district court should be vacated and the cause remanded to the Commission for further proceedings in conformity with the principles herein set forth.

Respectfully submitted..

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JANUARY 1963.

APPENDIX

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding Sections 1, 301, 901, and 1001, provides:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions:—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 15(7), 49 U.S.C. §15(7), provides:

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new indi-

vidual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint, or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are

paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 15a, 49 U.S.C. 15a, provides:

(1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

(3) In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission,

in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

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IN THE

Supreme Court of the United States

U.S. Supreme Court, U.S.

FILED

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JOHN F. DAVIS, CLERK

October Term, 1962

Nos. 108, 109, 110, 125

INTERSTATE COMMERCE COMMISSION,

v.

Appellant in 108

**THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, ET AL.**

SEA-LAND SERVICE, INC.,

v.

Appellant in 109

**THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, ET AL.**

SEATRAN LINES, INC.,

v.

Appellant in 110

**THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, ET AL.**

UNITED STATES OF AMERICA,

v.

Appellant in 125

**THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, ET AL.**

**On Appeal From the United States District Court for the
District of Connecticut**

BRIEF OF THE APPELLEES

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RAILROAD COMPANY, ET AL.

UNITED STATES OF AMERICA,

Appellant in 125

v.

THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

BRIEF OF THE APPELLEES

I

THE STATUTES INVOLVED

The statutes which are involved are set forth in the Appendix to the brief of the United States. Of these, Section 15a(3) of the Interstate Commerce Act,¹ is the cardinal one. It reads:

"In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

II

THE QUESTION

Did the Court below properly set aside as unlawful under Section 15a(3) of the Interstate Commerce Act an order of the Interstate Commerce Commission which required the cancellation of compensatory reduced rail trailer-on-flatcar (TOFC) rates published on parity levels to meet rates of Sea-Land Service, Inc. for its newly established coastwise trailership service, and which further required such TOFC rates to be pegged 6 percent higher than the comparable Sea-Land rates to be lawful, where the only basis for the Commission's action was that Sea-Land, and Seatrain Lines, Inc., another coastwise water carrier, needed the protection of pricing differentials in their favor to maintain rates which would enable them to continue efficient and economical service of benefit to the nation's commerce and defense?

1. 49 U. S. C. § 15a(3). Section 15a(3) was incorporated into the Interstate Commerce Act by the Transportation Act of 1958, 72 Stat. 572.

III STATEMENT

This brief will answer the briefs of the several appellants.²

The briefs of the Commission and the United States,³ to a large extent, describe fairly the background and nature of the pricing controversy, the proceedings before the Commission and the actions taken by it. But the report of the Commission (R. 4) contains findings upon the record before it not commented upon by any of the appellants which are of considerable significance and which place the TOFC rate reductions of the railroads in the correct perspective.

When Sea-Land (formerly Pan-Atlantic Steamship Corp.) began its new trailership operation between the east, on the one hand, and the southern and southwestern states, on the other, which offered the shippers and consignees a service "closely akin to railroad trailer-on-flatcar service with the substitution of the deck or the hold of a vessel for the rail flat-car" (R. 8), it published a line of commodity rates 5 percent to 7 percent lower than the corresponding

2. Briefs were received from: Sea-Land Service, Inc., appellant in No. 109, on January 8, 1963; Seatrain Lines, Inc., appellant in No. 110, on January 10, 1963; the Interstate Commerce Commission, appellant in No. 108, on January 11, 1963; the United States, appellant in No. 125, on January 11, 1963; Waterways Freight Bureau, an *amicus curiae*, on January 9, 1963; and from the American Trucking Associations, Inc., another *amicus curiae*, on January 9, 1963. All of these will be answered to the extent that answer is required in this one brief of the appellees. Since the brief of the United States in many respects advances the position of these appellees and admits that the determination of the Court below was correct, although disagreeing with portions of the *obiter dicta* of that Court, some of the arguments, positions and authorities set forth by the Government will be adopted by these railroads to avoid unnecessary repetition.

3. With the exception of the brief of the United States, the briefs of the several appellants and *amici* supporting them, are substantially similar.

all-rail boxcar rates. Some 700 of these reduced Sea-Land rates were placed under investigation by the Commission and their lawfulness was considered on a consolidated basis with the lawfulness of the 66 TOFC rates which are the subject of the litigation here. All of these reduced Sea-Land rates, with the exception of a few found to be non-compensatory, were held to be lawful by the Commission and are presently in effect.

Sea-Land's new service posed a serious competitive threat to the railroads because it, like that of the motor carriers, offered the shippers virtually damage free door-to-door transportation in highway-type containers, with the loading and unloading being done by the carrier. By contrast, shipping in boxcars required the shippers and consignees to load and unload the lading at their own expense, with the incidence of damage being far greater than when highway type containers were used. Where the shippers and consignees employing boxcars were without rail sidings, local drayage was required, thus adding expense not incurred with the use of Sea-Land (R. 193). Because of the differences in the quality of the two services, and particularly since Sea-Land's rates included transportation services not covered by the boxcar rates, the railroads were of the belief that their higher priced, lower quality, boxcar services were at a competitive disadvantage.

But they had another service, namely TOFC, which was virtually the counterpart of Sea-Land's. Within the area in which Sea-Land was affording new cut-rate competition, TOFC service, however, was priced higher than rail boxcar service. Since Sea-Land had discounted the rail boxcar pricing by 5 percent to 7 percent, it enjoyed an even greater pricing advantage with respect to TOFC. As the Commission found, ". . . the railroads were convinced that they could not compete without a reduction in the TOFC rates . . ." and therefore, decided on a trial basis to publish a limited number ". . . of TOFC rates on the same level as the sea-land rates, . . ." (R. 19). This the Commission

found was done upon the assumption "... that these two operations, which have many of the characteristics of overland motor-carrier service, are equivalents from the quality standpoint, and that therefore, in the absence of special circumstances, they should be priced at the same levels" (R. 19).

The railroads' TOFC reductions must, therefore, be viewed as fairly made in the tradition of business generally for the purpose of meeting a new competitive threat. It is noteworthy that nowhere in the several reports of the Examiner who first considered the lawfulness of the Sea-Land and TOFC reductions, or in the Division's report that preceded the Commission's final report, or in the final report itself, is there any finding, observation or inference that the rail reductions were made for the purpose of destroying Sea-Land or any other water carrier, or that such reductions were predatory in that sense. Further, it should be noted that while the Commission concluded that Sea-Land requires pricing differentials in its favor to successfully compete (R. 41), it found that as an inducement to use Sea-Land versus rail service "... [t]he most important, and usually the determinative factor to the shippers as a whole is the measure of the rates" (R. 13). In other words, despite varying appraisals of the shippers of the relative qualities of the competing services, the factor most strongly motivating the selection of one over the other was the level of the price at which it was offered (R. 45).

While some of the appellants here have inferred that the TOFC reductions in some way contravene the pricing policies of this nation because they were selective in the sense that they only apply where Sea-Land competition existed and did not have application to interior points,⁴ the Department of Justice, which has responsibility for enforcing fair pricing practices throughout a large segment of

⁴ See e.g., briefs of Seatrains at 12, Sea-Land at 8, and Waterways Freight Bureau at 27.

American business and commerce, in its brief unequivocally states that such spot adjustments to meet competition are "permissible" under the Interstate Commerce Act and in support refers to a congressional staff study which observed ". . . freedom to make such spot rates of this type is historic."⁵

Turning only briefly to the costs, because they were not relied upon by the Commission in condemning the TOFC rates, there is no dispute with the finding that the TOFC rates were shown to be compensatory (R. 34). As to relative costs, the Commission found that the Sea-Land costs, compared with those of rail TOFC service, were somewhat lower (R. 36). But what may be overlooked is the conclusion of the Commission's Cost Section that, comparing rail boxcar costs with those of Sea-Land, the record showed ". . . that for most of the movements where rail costs are shown, the Sea-Land costs exceed the all-rail costs of boxcar service, and that this relationship is more pronounced at higher minimum weights" (R. 17).⁶

But the significant thing about the costs is that the Commission clearly stated that it could not ". . . determine on these records where the inherent advantages [i.e. relative cost advantages] may lie as to any of the rates in issue" and that the condemnation of the reduced TOFC

5. Brief of United States, n. 8, at 21.

6. Sea-Land introduced costs for the 700 movements, the rates of which were under investigation in the several consolidated dockets. For many of these, where there were comparable rail boxcar movements, i.e., where the railroads published commodity rates at reasonably comparable minimum weights, Sea-Land also submitted rail boxcar costs (R. 206). For such rail movements the railroads also presented their costs (R. 207). These compared costs showed that in most instances the railroads for boxcar movements, had the economic advantage of lower costs (R. 17). Since the legality of the boxcar rates was not in issue and the railroads were not seeking the prescription of differentials in their favor, their purpose in presenting the lower cost showing was to negate any claim that Sea-Land might have made that it had an inherent advantage of lower cost and thus might be entitled to differentials in its favor (R. 15).

rates was based upon "other considerations" appearing to it "determinative of the issues" (R. 37).⁷

In summary, the Commission's conclusion that the TOFC rates at parity with the Sea-Land rates were unlawful, and would only be lawful if artificially pegged to provide Sea-Land with a 6 percent differential in its favor, was not based on any finding that the TOFC rates were: non-compensatory; predatory in the sense of being intended to harm or destroy a competitor; improperly selective; or that they would impair or destroy an inherent cost advantage enjoyed by Sea-Land or Seatrain. Rather they were found unlawful solely because they would divert traffic from those water carriers and, if extended on a broad scale, would make it difficult for them to continue in operation. This the Commission concluded, threatened the continued existence of coastwise water service to the detriment of the public interest in preserving such service. The Court below held the basis used by the Commission was unlawful because of the provisions of Section 15a(3) of the Interstate Commerce Act (R. 249).

7. While the Court below and the United States, in its brief, both indicate that the preservation of an inherent advantage of lower costs provides a basis for the Commission's prescribing differentials to protect the lower cost carrier's pricing structure from erosion by pricing reductions of the higher cost agency, none of the appellants is here claiming that the Commission's action was justified on such a basis. The entire thrust of the argument of Sea-Land, for example, is to the effect that the protection of the low cost advantage is only a factor along with others to be considered, and that it can be ignored in determining whether the traffic of one mode should be protected from pricing reductions of another. (Brief of Sea-Land beginning at 15.)

IV

SUMMARY OF ARGUMENT

The Court below correctly held that the Commission by the provisions of Section 15a(3) of the Interstate Commerce Act, was precluded from finding unlawful reduced compensatory TOFC pricing where the basis for its so doing was its conclusion that the pricing reductions would create difficulties for the coastwise water carriers in continuing to provide efficient and economical services and would thus threaten their existence. This holding of the Court below with respect to the limitation that Section 15a(3) imposes upon the Commission's powers to hold unlawful pricing reductions of competitors of different modes of transportation is fully sustained by the legislative history of the Section and is consistent with the purposes and objectives of the Congress in enacting the new rule of rate-making.

The Commission may not—as the Court below held—by relying upon the end objective of the National Transportation Policy that a transportation system adequate for the commerce and defense of the United States be preserved, deviate from the specific mandates of the policy itself or the requirements of the implementing provisions of the Interstate Commerce Act. But even assuming the Commission might do this in the extraordinary circumstances where pricing differentials are required to preserve a particular carrier uniquely essential to the national defense which could not otherwise survive, it did not include findings sufficient to establish that such extraordinary circumstances were here present.

Contrary to the arguments of some of the appellants, the Court below did not hold that the only lawful basis for condemning reduced intermode competitive pricing is the protection of an inherent low cost advantage of one mode. Rather, the Court made it plain that pricing which involves “practices other than the normal incidents of fair competition” may be outlawed as being embraced within the National Transportation Policy’s mandate to the Commis-

sion to administer the Act to avoid "unfair or destructive competitive practices". While the Court, in holding that reduced pricing, which will divert substantial traffic from another mode and thereby threaten its ability to continue operations does not, by the terms of Section 15a(3), as interpreted in the light of its legislative history, constitute a proscribed "unfair or destructive competitive practice", it has given an example of a pricing practice that would be reached by such proscription. Non-compensatory rates, the Court has indicated would be unlawful since they amount to an unfair or destructive competitive practice. Other federal courts have held that reduced pricing which is predatory in the sense that it is aimed at the destruction of a particular competitor, or which amounts to an unfair monopoly attempt, would also be outlawed.

The discussion of the Court below with respect to the protection of an inherent low cost advantage of one mode of transportation from the pricing reductions of another is *obiter dictum* since the protection of an inherent cost advantage was not the basis of the Commission's finding of unlawfulness.

The railroads most respectfully suggest that if this Court were to approve the *obiter dictum* of the Court below, that under Section 15a(3), the Commission may find unlawful reduced competitive pricing of one mode to protect an inherent low cost advantage of another mode, it should not attempt to advise the Commission how an inherent low cost advantage should be determined or, if properly found to exist, the details of how it should be protected. Rather, it is suggested that these are matters which should be left to the Commission's expertise in the first instance for determination upon adequate records. Should the Commission make such determinations—which it has not done as yet and certainly has not done in the Sea-Land litigation—court review might be appropriate.

V

ARGUMENT

A. Review by the Courts Is Limited to the Basis Which the Commission Relied Upon in Reaching Its Determination.

The Court below, in setting aside the Commission's order, stated that its holding was rested upon the basis which the Commission said it had used in finding the reduced TOFC rates unlawful (R. 258). Whether there might have existed other bases which would have lawfully empowered the Commission to take the action it did, the Court below indicated was not before it for consideration, citing *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, 87. This proposition has recently been reaffirmed by this Court with respect to orders of the Interstate Commerce Commission. *Burlington Truck Lines, Inc. v. United States*, — U. S. —, 83 S. Ct. 239, 246.⁸

Thus, the question before this Court is whether the Commission's stated basis for its action was lawful and not whether upon some other, but unannounced basis, either supported by the record or not, its order could be sustained. We most respectfully invite this Court's attention to this at the outset because it is believed that it disposes of arguments and contentions which were not before the Court below for decision, and are not before this Court for review. Furthermore, we suggest that recognition of the *Chenery* doctrine here may avoid consideration of controversial economic questions of a type which, in the first instance, should be fully considered by the Commission within a

8. In *Burlington*, the Court approved the *Chenery* doctrine as set forth in *Securities Comm'n v. Chenery*, 332 U. S. 194, 196 [i.e., the second *Chenery* case]. So far as the instant proposition is concerned, the second *Chenery* case affirmed the first. *Securities Comm'n v. Chenery*, 318 U. S. 80, 87.

frame of actual facts rather than as abstract exercises. After such initial Commission consideration, court review would, of course, be appropriate to ascertain whether or not the agency had remained within its statutory limitations. Particularly, we suggest that this is true within respect to the ascertainment of the existence of inherent low cost advantages and the details of how such advantages are to be protected, for these seemingly are matters peculiarly within the expertise of the Commission. ✓

B. The Basis Used by the Commission, Namely That the Reduced TOFC Rates Under the Circumstances Present Constituted Destructive Competition, Was Inconsistent With the Provisions of Section 15a(3) and, Therefore, the Court Below Correctly Set Aside the Commission's Order as Unlawful.

Completely disregarding the preservation of an inherent advantage of low cost (R. 37), saying it could not determine which mode possessed such advantage, the Commission found unlawful the reduced compensatory TOFC pricing primarily upon the basis that it constituted "destructive competition" (R. 34). While Section 15a(3) does not say "destructive competition" is unlawful, the National Transportation Policy does require the Commission to administer the Interstate Commerce Act ". . . to encourage the establishment and maintenance of reasonable charges . . . without . . . unfair or destructive competitive practices". Presumably, the Commission in referring to destructive competition was using the term as being synonymous with unfair or destructive competitive practices.

The Commission's conclusion was that the reduced TOFC rates were unlawful as destructive competition because, if extended, they would threaten the ability of the coastwise water carriers to operate efficient and economical services, apparently either by diverting traffic from them,

or by compelling them to reduce their rates to remain competitively attractive (R. 38, 41). In broad and general terms, the Commission then said the coastwise water carriers are important to the commerce of the nation and its defense and that, because of this, their traffic should be protected from otherwise lawful rail pricing reductions (R. 39-41). But at no point did the Commission specifically find how the commerce of the nation or its defense would be imperiled, even assuming the worst that all four of Sea-Land's vessels, and all six of Seatrain's vessels (R. 10), would be forced to withdraw from the trades.

The Commission's reliance upon the preservation of the national defense to deviate from the specified requirements of the Interstate Commerce Act, the Court below concluded, was improper for two reasons: first, because the preservation of the national defense is not a mandate of the National Transportation Policy as to how the Act is to be administered, but rather its "hoped-for 'end'", assuming the Act is soundly administered in conformity with the specified mandates of the Policy (R. 256); and, second, because the facts which the Commission said it relied upon would not support its conclusion that the national defense would be jeopardized if Sea-Land and Seatrain were to withdraw from the coastwise trades (R. 257).

The Government, in its brief, disagrees with the first reason given by the Court below saying there may be extraordinary circumstances where preservation of the national defense would warrant the Commission's ignoring Section 15a(3)'s prohibition against protective pricing differentials.⁹ But, in substance, the Government agrees with the second reason of the Court below and goes further and argues that the Commission's report is completely lacking in the type of findings required to utilize the preservation of the national defense as a basis for "protective differentials".¹⁰

9. See brief of United States at 44, 46, 47.

10. *Id.* at 45, 48, 49.

In a later section of this brief (*infra* 23 to 29) the question of whether the Commission has power to prescribe protective pricing differentials to preserve carriers for national defense purposes, either upon the statements it made with respect to the coastwise water carriers in the instant proceeding, or upon appropriate detailed findings such as the Government suggests would be required to authorize the Commission to deviate from the specific anti-protective declaration in Section 15a(3), will be discussed more fully. At this point the question being considered is, aside from the national defense aspect, was the basis used by the Commission within its powers in the light of the new rule of rate-making?

Essentially, the basis amounts to this. If a carrier of one mode reduces its rates and, by so doing, may divert traffic from carriers of another mode to the extent that their continued existence is threatened, the rate reductions may be found unlawful solely because of the severity of their competitive impact. This is so even though the adversely affected carriers are not found to be possessed of inherent cost advantages, and the rate reductions, aside from the fact that they will attract traffic in large amounts, would be lawful.

The Court below held that the Commission, in using this basis, violated Section 15a(3) since "... contrary to the specific prohibition of the 1958 amendment, [it] is plainly holding up railroad rates 'to protect the traffic' of another mode", and pointed out that due consideration of the National Transportation Policy would not in this instance justify deviation from the specific prohibition of the Section (R. 247). Looking to the National Transportation Policy, the Court concluded that while it requires the Commission to recognize and preserve "inherent advantages", meaning the ability to offer services at lower costs, the Commission did not "... rest its holding on the 'inherent advantages' factor of the ... [Policy]" (R. 249). Rather, the Court said the Commission relied upon the Pol-

icy's directive against unfair, destructive, competitive practices to justify its decision. This under the circumstances present "... was an erroneous interpretation of the Act as amended" the Court held, (R. 249) and referred primarily to the legislative history and purposes of Section 15a(3) to support its holding (R. 250, 251).

Before considering the legislative history—a consideration that will be greatly shortened since the Government and the Commission, in their briefs, have reviewed the history so fully—it would seem appropriate to invite this Court's attention to the fact that two other three judge federal courts, without dissent, have held that the Commission, under the new rule of rate-making, may not, in the interest of preserving useful carrier services, find unlawful reduced pricing of a different competitive mode which is compensatory and which will not destroy or impair an established low cost advantage.

In *Missouri Pacific Railroad Company v. United States*, 203 F. Supp. 629 (E. D. Mo. 1962), a three judge court reversed an order of the Commission which had held unlawful reduced compensatory rail rates on the ground that they had diverted large volumes of traffic from motor carriers and thus endangered their ability to continue operations.¹¹ As was the case in the *Sea-Land* proceeding, the Commission, in reaching its conclusion had relied upon the National Transportation Policy and had not attempted to justify its action on the basis of preserving an established low cost advantage. The Court, holding the Commission's order unlawful, said:

"We have concluded that the decision based on the stated findings is erroneous and reflects a misinterpretation of the law as amended by Section 15a(3)."

11. 203 F. Supp. at 632.

"The resulting amendment was explicit in its prohibition of the 'protected' practices which the Congress attributed to the ICC during the 50's."

"Legislative history so clearly affirms the patent meaning of these words that it does not merit quotation."

"Yet, despite this amendment and its history, the Commission would drain its strength and negate its effect entirely by grasping the qualifications of 'giving due consideration to the objectives of the national transportation policy', and emphasizing it to the detriment of the directive it merely qualifies."¹²

Another three judge court reached the same conclusion where the Commission found unlawful reduced rates on cigars which it found would either divert substantial traffic from the motor carriers or force them to reduce their rates to remain competitive. *St. Louis-San Francisco Railway Co. v. United States*, 207 F. Supp. 293, 297 (E. D. Mo. 1962).¹³

12. 203 F. Supp. at 633, 634.

13. In *Pennsylvania Railroad Company v. United States*, 202 F. Supp. 584 (E. D. Pa. 1962), a three judge court held that under Section 15a(3) the Commission could not peg compensatory rail rates at artificially high levels to protect the traffic of barge lines unless the water carriers had established an inherent advantage. It does not appear that the Commission attempted to justify its action under the National Transportation Policy, but rather was endeavoring to equalize the overall charges to the shippers using the different modes. To this extent, the case differs somewhat from the instant situation, but it does sustain the proposition which the Court below, in the *Sea-Land* case, propounded. *Atlantic Coast Line Railroad v. United States*, 209 F. Supp. 157 (S. D. Fla. 1962), in which a three judge court sustained an order of the Commission which had found unlawful reduced rail rates on phosphate rock on the ground that they would be harmful to the railroads, is in no way contrary to the holding of the Court below for it is based upon Section 15a(2) rather than Section 15a(3) of the Interstate Commerce Act. *Id.* at 159, n. 6 at 159.

These cases,¹⁴ while resting to a considerable degree upon the holding and reasoning of the Court below, are of significance because the courts in each, upon review of the legislative history and purposes of Section 15a(3), were convinced, as was the Court below, that Congress, by enactment of the Section, intended not only to increase and stimulate competition between the different modes, but also to make it clear once and for all that the protective policy of the Commission of attempting to divide the available traffic among the different modes by pricing differentials would be outlawed. Stated differently, the several courts which have studied the meaning of the new rule of rate-making have been firmly convinced that the requirement that the Commission give due consideration to the "objectives of the National Transportation Policy" does not empower it under that Policy's directive to eliminate "unfair or destructive competitive practices" to hold up the rates of one mode to a level which will prevent the diversion of substantial traffic from another mode, even though such loss of traffic might threaten the continued existence of the adversely affected carrier. Logic compels this conclusion, since any other view necessarily results in the specific anti-protective requirement of Section 15a(3), which was enacted for the express purpose of outlawing umbrella rate-making, being wholly ineffective. The legislative history also supports this conclusion.

1. *The Legislative History of Section 15a(3) and the Purposes of Congress in Enacting It Fully Sustain the Holding of the Court Below.*

With the exception of the Government, one of the principal contentions of the appellants and the *amici* supporting

¹⁴ The *Missouri Pacific* case is on appeal to this Court but neither the Commission nor the United States is an appellant. The *St. Louis-San Francisco Railway Co.* case is not presently on appeal to this Court, all parties having entered into a stipulation to dismiss the appeal.

them is that a review of the legislative history shows that Congress, in enacting the new rule of rate-making, did not intend to change the rate supervision powers of the Commission. The Commission, for example, in its brief says:

"As we interpret the legislative history, it demonstrates that Section 15a(3) brought about no fundamental change in the law. Rather, it would appear that the section's intended function was to insure that the Commission consistently apply the Congressional Policy which existed prior to the section's enactment

... "15.

But the Court below, found such position unrealistic and inconsistent with the stated objectives of the Congressional Committees which endorsed the legislation. As the Court said:

"Having in mind that by the 1958 amendment Congress for the first time articulated an express, though qualified, prohibition against holding up the rates of one mode to protect another . . . we are unable to accept the contention . . . that . . . [Section 15a(3)] brought about no fundamental change in the law." (R. 251)

Summarizing its review of the legislative history, the Government, in agreeing with the Court, now says:

"The foregoing account makes clear, we think, that it was not the intent of Congress to give the Commission with one hand what it had taken away with an-

15. Brief of Commission at 33, 34. See also brief of Seatrains at 13-15. The briefs of Sea-Land, American Trucking Association, and the Waterways Freight Bureau all suggest that the regulatory principles followed prior to the enactment of Section 15a(3) are preserved intact by the reference in the Section to the National Transportation Policy.

other—namely, the power to act as a ‘giant handicapper’ establishing whatever differentials might be necessary to equalize the race, or at least assure that no runner would drop out.”¹⁶

Without attempting to detail the legislative history again, certain features of it stand out. Section 15a(3) was not enacted upon the spur of the moment, but rather was the product of a great deal of study, controversy and reconciliation of different viewpoints within the transportation industry. Particularly among the railroads, there was great dissatisfaction with the manner in which the Commission was dealing with intermode competitive pricing adjustments. The Congressional Committees referred to the Commission’s treatment of these adjustments as “not consistent”¹⁷ and the Court below summarized the Commission’s action in this important field as vacillating (R. 250). While the Commission had indicated in the *New Automobiles* case that its policy was not to hold up the rates of one mode to preserve the pricing structure of another,¹⁸ this policy was regularly abandoned and a contrary policy, of prescribing rate differentials, or minimum rates, to divide the traffic according to its notion of what constituted fair shares, was pursued.¹⁹ The Congressional Committees were of the opinion that the rule of rate-making should be amended so that the inconsistent rate supervision ap-

16. Brief of United States at 38.

17. Report No. 1922 of House Committee on Interstate and Foreign Commerce on H. R. 12832, 85th Cong. 2d Sess. at 14 (1958); Report No. 1647 of Senate Committee on Interstate and Foreign Commerce, 85th Cong. 2d Sess. at 3. (1958).

18. See *New Automobiles in Interstate Commerce*, 259 I. C. C. 475, 538 (1945).

19. See e.g., *Petroleum Products In Ill. Territory*, 280 I. C. C. 681, 691 (1951); *Coffee From California To Utah and Idaho*, 289 I. C. C. 93, 96 (1953); *Aluminum Articles From Texas To Ill. and Iowa*, 293 I. C. C. 467, 472 (1954); *Tin Plate From Fairfield, Ala. To New Orleans*, 294 I. C. C. 397, 403 (1955).

proach of the Commission would be brought to an end.²⁰ The policy which the Congress ordered the Commission to abandon was the protective one whereby rate differentials were prescribed in an attempt to divide the available traffic among competing modes. In place of this, the Commission was ordered to adhere to a policy which will permit a freer play of the forces of the market place. To accomplish this, the specific prohibition against rate differentials was incorporated in Section 15a(3). Certainly this changed the law for it forcefully told the Commission to discard a much used policy which it had regarded as being well within its powers.²¹

While it seems clear from the legislative history that the primary objective of the Congress was to eliminate rate differentials aimed at protecting the traffic of competitors of a different mode from the impact of reduced pricing, it is equally clear that the Commission's supervision over inter-mode competitive pricing was not completely abolished. The inclusion, in Section 15a(3), of the requirement that consideration be given to the National Transportation Policy insured the retention of some rate supervision by the Commission.

20. House Committee Report, *op. cit., supra*, note 17 at 15; Senate Committee Report, *op. cit., supra*, note 17 at 3.

21. While within the Commission the opinion may exist that Section 15a(3) did not change the law, this viewpoint apparently is not shared by Mr. Harris, the Chairman of the House Committee on Interstate and Foreign Commerce which was largely responsible for the present language of the Section.

Criticizing a public statement by one of the Commissioners that the Section merely "... restates what is already considered to be the Commission's responsibility under the rate making provision of the Interstate Commerce Act", Mr. Harris made it abundantly plain that he thought differently, and that "... Congress ... worked long and hard and diligently and came up with a change in the law, ...". See Investigation of Regulatory Commissions and Agencies, Hearings Before a Subcommittee of House Committee on Interstate and Foreign Commerce, 85th Cong. 2d Sess., and 86th Cong. 1st Sess., Part 14 at 5429-5433 (1958, 1959).

The mandates of that Policy reasonably related to rate regulation require the Commission to do three things: (a) to recognize and preserve inherent advantages; (b) to promote economical service and foster sound economic conditions; and, (c) to encourage the establishment of reasonable charges without unjust discrimination, undue preference of advantages, or unfair or destructive competitive practices. Leaving aside the preservation of inherent advantages for the moment because the legislative history indicates that the carriers should be free to utilize their inherent advantages,²² the question here presented is: Does the legislative history support the appellants' argument to the effect that, the National Transportation Policy's proscription of unfair or destructive competitive practices nullifies Section 15a(3)'s specific prohibition against protective differentials where pricing reductions making possible substantial diversion of traffic threaten the existence of a competitor of a different mode? The Committee Reports do not precisely answer this question as such, but the stated objective in both reports, to encourage competition between the different modes would obviously be thwarted if the prohibition against protective pricing differentials only applies where the competition is soft and the diversion of traffic likely to be inconsequential.²³

The debates in the Congress, however, provide the answer to this very question. Senator Lausche referred to as "... one of the knowledgeable members of the committee in the field of transportation"²⁴ made it plain that the Section was aimed at the elimination of the type of thing he described in these terms:

"It may astound some of my colleagues to hear me state that the railroads are not allowed to charge a low

22. Senate Committee Report, *op. cit.*, *supra*, note 17 at 3; House Committee Report, *op. cit.*, *supra*, note 17 at 14.

23. Senate Committee Report, *op. cit.*, *supra*, note 17, at 3; House Committee Report, *op. cit.*, *supra*, note 17 at 15.

24. 104 Cong. Rec. 10841.

rate, even though the low rate produces a profit for them and is non-discriminatory with respect to shippers, if the lowness of the rate has an adverse impact upon the truckers, the barge carriers, or the air lines.

"The railroads are required to hold an umbrella over the heads of the truckers and barge lines. They are told, when they charge a rate which is low, even though it makes a profit for them, that such rate is not allowable if it will adversely affect the ability of the truckers or the barge lines to remain in business." ²⁵

Representative Harris, who was Chairman of the House Committee on Interstate and Foreign Commerce, and who took a leading part in drafting Section 15a(3) made a similar statement on the House floor in answering a question as to whether reference to the National Transportation Policy was "strong enough to prevent one carrier from taking advantage of another carrier". He replied:

"That is true, but I will tell you another thing though, that if a carrier can provide a rate, that is fully compensatory, to the shipping public, the Commission cannot as it is contended in many instances they are doing, require that carrier to hold that rate up to a higher level just because it is necessary to keep another mode of transportation in business." ²⁶

Thus, in addition to there being nothing in the legislative history to support a view that the prohibition against protective pricing differentials is to be nullified if the re-

25. *Id.* at 10822.

26. *Id.* at 12531. Representative Allen expressed the same thoughts for he said:

"No longer will railroad rates, for example, be held by the ICC at a high level just to keep traffic from being diverted from the highways and inland waterways." (*Id.* at 12524)

duced pricing will cause such a substantial diversion of traffic as to threaten the continued existence of a competitor, the debates on the floor of both the Senate and the House fully sustain the opposite conclusion, namely, that the application or relaxation of the prohibition is not dependent upon the severity of the adverse effects of the rate reductions.

Several of the appellants and those supporting them, argue that it was not the intention of Congress in enacting Section 15a(3) to modify or change the National Transportation Policy,²⁷ and that since the Commission had utilized that Policy in the past as a basis for finding that reduced rates, which diverted substantial traffic from competitors and thereby threatened their ability to continue operations, were unlawful, this power survives despite the specific prohibition in the Section against protective differentials. The short answer to this is that the Congressional Committees thought such actions by the Commission, prior to 1958, were inconsistent with the exactly contrary policy announced by it in the *New Automobiles* case, *supra*. So that the Commission would be informed as to which of the two contrary policies should be followed, the Congress enacted the specific prohibition against protective differentials and, in effect, said that insofar as it was concerned, and regardless of what the Commission had earlier decided it had power to do, or even what the courts indicated the Commission's powers might have been, the National Transportation Policy had been improperly used to hold up prices to protect the traffic of adversely affected competitors. Congress further indicated that it wanted to make certain that the Commission understood that the National Transportation Policy compelled the Commission to follow the doctrine of the *New Automobiles* case. This view, it should be noted, is completely logical and makes good sense since it removes any seeming conflict between the specific prohibition of Sec-

27. See e.g., briefs of: Commission at 14, 15; Seatrain at 14; and, Waterways Freight Bureau at 18.

tion 15a(3) and the terms of the National Transportation Policy.²⁸

C. The National Transportation Policy Does Not Empower the Commission in the Interest of Preserving Carriers Deemed by It to Be Important to the National Defense to Deviate From the Basic Scheme of Economic Regulation Provided by the Interstate Commerce Act.

The Court below held that the Commission could not, by reliance upon the preservation of the national defense, make lawful rate supervisory functions which are placed beyond its powers by the specific provisions of the Interstate Commerce Act. As the Court stated (R. 256):

“True, the hoped-for ‘end’ of the National Transportation Policy is a system ‘adequate to meet the needs * * * of the national defense’. But the national defense is not stated as an operative policy or means; it is mentioned only as the hoped-for ‘end’ of the operative policy-factors previously enumerated. It is not stated and, we think not intended, as a blanket ground of power to the Commission effective to nullify the expressed prohibition of rate differentials.”

The Government, in its brief, says that this position goes too far and that there may be circumstances where the Commission, to preserve a carrier vital to the national defense, could go beyond what otherwise would be the

28. There is a tendency on the part of the appellants to define the meaning of “unfair or destructive competitive practices” as used in the National Transportation Policy in its own terms or by generic words. For example, the brief of Sea-Land, at 11, talks of the need to protect against “predatory rate practices” and at 15 says the prevention of destructive competition must mean that “competition which destroys be proscribed in the future”. The brief of American Trucking Associations, at 22, says it is necessary “where competition exists to prevent destructive competitive practices”. The difficulty with this approach is that it does not provide constructive assistance in defining or proscribing just what types of activities are embraced within the objectionable conduct.

borders of its statutory powers.²⁹ The situation would have to be an extraordinary one—one in which the carrier sought to be protected by the pricing differentials is fulfilling a role essential to the defense of the nation which could not be adequately fulfilled by other carriers.³⁰ But the Government argues that the Commission in this instance made no findings which would satisfy such a test.³¹

The Commission, the Court below says, had “scant basis of fact” to support its order based on national defense considerations (R. 256). Actually, all the Commission referred to were two reports, one published in 1955 by the Maritime Administration and the other in 1950 by a Senate Committee which concluded in the most general terms that the availability of domestic tonnage is of importance to the national defense (R. 38-39). These broadly stated conclusions do not demonstrate what is the extent of the contribution of Seatrain’s and Sea-Land’s relatively small number of vessels to the overall defense program;³² nor do they

29. Brief of United States at 44, 46, 48.

30. *Id.* at 46-48.

31. *Id.* at 49.

32. The Commission apparently thought that Sea-Land and Seatrain were important to the national defense because they were the two remaining, out of some nineteen, companies which were engaged in the coastwise trades prior to World War II (R. 38). To place these statistics in the right light, the Commission might have indicated, as the Examiner did, that this was caused by “substantial increases in operating costs” (R. 176). Further, to have given a full picture, the Commission might have indicated that domestic coastwise shipping has not declined. In 1939, the total domestic tons handled between the North Atlantic, South Atlantic and Gulf ports totaled 108 million tons. Economic Review of Coastwise and Intercoastal Transportation, U. S. Maritime Commission at Appendix I-V (1941). Every year since 1952 this tonnage has increased, and by 1960 had reached 134 million tons. Domestic Oceanborne and Great Lakes Commerce of the United States, U. S. Dept. of Commerce, Maritime Administration at 1, 2, 87, 88 [tonnages compiled from various tables] (1962). Furthermore, while the number of vessels in the trades has decreased, their capacity has steadily grown. Thus, in 1940, the total deadweight tonnage of vessels used in the domestic trades totaled 4,172 thousands of tons, and by 1960 this had grown to 4,883

explain why the national defense would be better served by retaining the availability of those carriers' ships at the expense of prohibiting the railroads—a vital part of the national defense system³³—from effectively competing for traffic at reduced compensatory rates and thereby affording the shipping public economical freight charges. Commenting upon the absence of specific findings in the report of the majority of the Commission, Commissioner Freas, in his dissent, said:

“There is no evidence here that either the commerce of the United States or the national defense would be hampered unless the water carriers, though not shown to have the inherent advantages in many instances, are given an artificial rate advantage. A reiteration of some of the language contained in the national transportation policy is in and of itself no substitute for essential supporting evidence.”

thousands of tons. Statistical Abstract of the United States, U. S. Dept. of Commerce, Bureau of Census at 601 (1962). The coast-wise trades, therefore, have not declined, but have grown. The consist of the traffic handled in these trades has changed, however, so that today most of the freight being moved in this segment of the ocean trade consists of bulk commodities which move completely free of regulation by the Commission. The only decline in coast-wise tonnage is traffic which is peculiarly susceptible to motor carrier competition.

By contrast the Commission might also have pointed out that the freight traffic of the railroads has steadily declined since 1950. 76th Annual Report of the Interstate Commerce Commission at 215 (1962).

33. In the introduction to its report proposing the legislative changes which were later incorporated in the Transportation Act of 1958, of which Section 15a(3) was a part, the Senate Subcommittee said:

“During times of crisis for our Nation the railroads have met the challenge. During World War II the railroads transported more than 90 percent of all military freight traffic and 97 percent of organized military passenger movements. Thus the railroads were, and are, a vital part of this Nation's security.” (Senate Committee Report, *op. cit.*, *supra*, note 17 at 7)

The decision of the majority may well be taken to stand for the proposition that water carriers are ordinarily entitled to rate differentials regardless of the circumstances of the specific case." (R. 45)

Because of the absence of adequate findings to support the use of the national defense as a basis for disregarding the Section 15a(3) prohibition against protective pricing differentials—whether or not such basis might be lawfully used when buttressed by sufficient findings—the report of the Commission, to the extent that is based upon the national defense, must be found wanting as the Government contends and the Court below held.³⁴

But it is the position of the railroads that the basic national defense holding of the Court below is sound and that, therefore, the lack, or inadequacy, of the findings, while a sufficient basis for setting aside the Commission's order, did not have to be relied upon.

The Interstate Commerce Act, taken in its entirety, provides a pattern for regulating a large segment of the transportation industry. While the regulation provided by this pattern is complex, intricate, and detailed, the Congress in the National Transportation Policy has indicated that if such regulation is pursued fairly with due regard for the basic mandates set forth in the policy itself, the end product will be a national transportation system adequate for the commerce and the defense of the United States. Where, however, the Congress has become convinced the scheme of regulation, either because of inadequacies of the statute or in the administration of the law by the Commis-

34. See *Cantlay & Tanzola v. United States*, 115 F. Supp. 72, 80 (S. D. Cal. 1953); *Pacific Inland Tariff Bureau v. United States*, 129 F. Supp. 472, 484 (D. Ore. 1955). In *Pacific Inland Tariff Bureau*, the court found the reduced rail rates to be non-compensatory and hence unlawful regardless of the national defense considerations. *Id.* at 485. It should be noted that both cases arose before the enactment of Section 15a(3), and that, therefore, to the extent that they might indicate the national defense is a basis for protective pricing differentials, they are entitled to little, or no, weight.

sion, is not accomplishing the objective of providing an adequate national transportation system, the remedy has been either a major change in the entire scheme or an overhauling of particular sections of the Act. Typical of the major revisions were the Motor Carrier Act of 1935,³⁵ which brought a fairly large segment of the for-hire motor carrier industry under regulation, and the Transportation Act of 1940, which placed some of the water carriers under the supervision of the Commission.³⁶ Both of these broad changes were made to strengthen and improve the national transportation system so that it would be better able to serve the public interest.³⁷

The overhaul of particular sections and the inclusion of new sections to improve the national transportation system has frequently been resorted to, and no better example is the Transportation Act of 1958, of which Section 15a(3) is a part. This statute was concerned with specific regulatory inadequacies rather than broad gaps in the pattern. Speaking of the objectives of this reform legislation, the House Committee said:

"The purpose of this bill is to amend the Interstate Commerce Act in order to strengthen and improve our Nation's common carrier surface transportation system so that it may better fulfill its role in meeting the transportation needs of the Nation's expanding economy and the requirements of national defense."

and went on to say:

"This purpose is accomplished through five amendments:

35. 49 Stat. 543. The Transportation Act of 1940, 54 Stat. 919, included the Motor Carrier Act of 1935 as Part II of the Interstate Commerce Act. 49 U. S. C. § 301.

36. 54 Stat. 929.

37. See Report No. 482 of Senate Committee on Interstate Commerce, 74th Cong. 1st Sess. at 3 (1935); Report No. 433 of Senate Committee on Interstate Commerce, 76th Cong. 1st Sess. at 2, 3, 4 (1939).

"Section 5 (amending sec. 15a of the act) adds a new paragraph to guide the Commission in competitive rate cases."³⁸

It is clear, therefore, that the Congress, when it enacted Section 15a(3), was convinced that the national defense would be better served if the Commission were forbidden to pursue its protective pricing policies aimed at dividing traffic among the competitors of different modes and were ordered to follow the contrary policy of the *New Automobiles* case. Congress felt that the national transportation system would be improved and strengthened to the ultimate benefit of the nation's commerce and defense by ordering the Commission to allow carrier pricing to be determined in the marketplace rather than by artificial administrative restraints.

If the Commission has the right to disregard the standards provided by Section 15a(3) whenever it becomes of a mind that the national defense requires it to do so, in effect it is possessed of power to veto the Congress' scheme of regulation and to advance its ideas of how the national defense should be provided for in place of those of the Congress. This, we contend, is not the role which the Congress has intended for the Commission.

If there is a specific transportation service vital to the defense effort being furnished by a particular carrier, which cannot survive with prices established in the competitive marketplace and must, therefore, have artificially high charges to continue to provide the essential defense transportation,—and this vital service cannot be efficiently furnished by other carriers—the remedy is not to break down the pattern of regulation as it applies throughout the pricing field. Rather, those charged with the responsibility for the nation's defense should pay for such essential transportation service at levels high enough to keep the company providing it alive. Whether this would amount to subsidy would seem immaterial in such circumstances.

38. House Committee Report, *op. cit. supra*, n. 17 at 2.

D. The Holding of the Court Below Will Not Support the Proposition That the Commission's Only Basis for Finding Unlawful Reduced Intermodal Competitive Pricing Is to Protect an Inherent Low Cost Advantage.

With the exception of the United States³⁹, the thrust of the arguments of the appellants is to the effect that the Court below has held that the only basis upon which the Commission can find unreasonable pricing reductions of one mode, which will affect carriers of another mode, is where the protection of an inherent low cost advantage is involved.⁴⁰ This was not the holding of the Court. What the Court held was that the basis used by the Commission—namely, that it could find unreasonable, hence unlawful, reduced compensatory rates of one mode which, by diverting substantial traffic, would threaten the ability of carriers of another mode to continue operations—was not available to it because of the prohibition in Section 15a(3). That was the limit of the Court's holding because under the *Chenery* doctrine⁴⁰ the legality of the basis used by the Commission was all that was before the Court for decision.

The language of the Court below confirms this (R. 249):

"Apparently the Commission thought that any rate competition which threatens the continued existence of a competitor it had power to prevent as a 'destructive competitive practice' irrespective of whether the challenged rates were compensatory to the proponent thereof or whether the mode of the contesting competitor was a lower-cost mode than that of the proponent. . . . This, we hold, was an erroneous interpretation of the Act, as amended."

39. Briefs of: Commission at 15; Sea-Road at 15; Seatrail at 13; Waterways Freight Bureau at 23; and, American Trucking Associations at 21.

40. *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, 87, 88; 332 U. S. 194, 196.

As the argument of the United States is understood, it is of the same mind as the railroads with respect to the actual holding of the Court below. At page 12 of its brief the Government says:

"We agree with the district court that the Commission's order, to the extent it relied upon destructive competitive practices, cannot stand."

The Commission, however, in addition to finding the reduced TOFC rates unlawful, also indicated that for such rates to be lawful they would have to be maintained at levels 6 percent higher than the corresponding Sea-Land rates, and that the rail boxcar rates should provide differentials favoring Sea-Land of "somewhat less than the 6 percent" (R. 41). The guideline respecting the rates for boxcar service was included even though such rates were not at issue, and even though the record showed that the railroads' boxcar costs were lower than Sea-Land's (R. 17).

While the Court held that the basis used in condemning the TOFC rates was unlawful, it undoubtedly thought there was value in going beyond the holding and suggesting to the Commission, by way of an extended *obiter dictum*, the conditions it believed would have to be present to support the prescription of protective differentials. Based upon its study and analysis of the legislative history, the Court was of the opinion that for the Commission to have power to prescribe protective differentials, factors would have to be present (R. 251):

"... other than the normal incidents of fair competition . . . , such as a practice which would destroy a competing mode of transportation by setting rates so low as to be hurtful to the proponent as well as his competitor, or so low as to deprive the competitor of the 'inherent advantage' of being the low-cost carrier."

This language supports the view that the Court below was not saying that the only circumstance which would per-

mit the Commission to find unlawful reduced competitive rates is the protection of an inherent low cost advantage. If the rate reduction includes practices which are "other than the normal incidents of fair competition" it may be found unlawful. By use of the words "such as", the Court indicates that it is giving two examples of unlawful reduced rates. The first example embraced in the mandate against "unfair or destructive practices" includes non-compensatory rates. The Government in its brief expresses the same thought, characterizing non-compensatory rates as one example of predatory rates.⁴¹ A review of the rate cases involving intermode competitive situations, since the enactment of Section 15a(3), will show that where the Commission has found reduced rates to be unlawful the basis most used was that they would be non-compensatory.⁴²

But in the absence of unfair or destructive competitive practices which the Court describes as pricing including "practices other than the normal incidents of fair competition",⁴³ the Court below concluded that the only remaining

41. Brief of United States at 13. Another type of predatory rate condemned by the National Transportation Policy directive against unfair or destructive competitive practice is one designed for the specific purpose of destroying a competitor. See *Lackenbach Steamship Co. v. United States*, 179 F. Supp. 605, 612 (D. Del. 1959), aff. 364 U. S. 280.

42. See Harbeson, *The Regulation of Interagency Rate Competition Under The Transportation Act of 1958*, 30 I. C. C. Prac. J. 287, 294 (1962).

43. In *New York Central Railroad Co. v. United States*, 194 F. Supp. 947 (S. D. N. Y. 1961), aff. 368 U. S. 349, the court said that in determining what types of pricing activities are included as "unfair or destructive competitive practices", the Commission and the courts can look to the Antitrust Statutes, 194 F. Supp. 951. The Antitrust Statutes would not outlaw pricing reductions made in good faith to meet new competition even though the impact would be most severe upon the new competitor. See *Ben Hur Coal Co. v. Wells*, 242 F. 2d 481, 486 (10th Cir. 1957), cert. denied 354 U. S. 910. *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, cited by Waterways Freight Bureau in its brief at 29, is not to the contrary but supports the view of the railroads [See note 41, *supra*] because there this Court found there was "ample" proof that the pricing reduction was for the purpose of destroying a competitor (348 U. S. 118). *F. T. C. v.*

basis for condemning pricing reductions is the preservation of inherent low cost advantages. The Government agrees with this view.⁴⁴

Since related to rates, the only mandates of the National Transportation Policy, other than the prevention of unfair or destructive competitive practices, that are germane, are those requiring the protection of inherent advantages⁴⁵ and the encouragement of sound economic conditions in transportation, the view of the Court below is consistent with the structure of the statute. The Government seemingly agrees. And, the legislative history, as detailed in the briefs of the Government and the Commission provides support for such position.

E. If This Court Deems It Appropriate to Approve the Obiter Dictum of the Court Below to the Effect That the Commission Has Power to Prescribe Differentials to Protect an Established Inherent Low Cost Advantage, the Commission in the First Instance, Subject to Judicial Review, Should Be Given the Responsibility of Developing the Rules for Determining the Existence of Inherent Low Cost Advantage and the Means by Which Such Advantage Is to Be Protected.

We believe that, aside from their basic disagreements with the holding of the Court below, the Commission and some of the other appellants are concerned that the Court's *obiter dictum* may remove from the Commission a function which it would seem is, at least in the first instance, rightfully its. Assuming the Court below is correct that the Commission may protect an inherent low cost advantage, how

Anheuser-Busch, Inc., 363 U. S. 536, likewise has no relevance because the contention that "... price reductions had been made in good faith to meet the equally low price of a competitor" had been rejected. *Id.* at 541.

44. Brief of United States at 13.

45. The advantage of lower costs is "... precisely the sort of 'inherent advantage' that the congressional policy requires the Commission to recognize", *Schaffer Transportation Co. v. United States*, 355 U. S. 83, 91.

the existence of such advantage is to be determined, we most respectfully suggest, is a function of the Commission. It is to be noted in this connection that in the instant matter the Commission has said that on the record before it, it could not determine which of the competing modes possessed the inherent low cost advantage and, therefore, this Court does not have before it the methods or the routes by which the Commission could make such a determination in future pricing controversies.

Throughout the briefs of the appellants, and broadly sprinkled through the opinion of the Court below, there are references to such concepts as "costs", "out-of-pocket costs", "fully distributed costs", "full costs", "compensatory rates", "fully compensatory rates", "comparative costs", "overall low-cost mode", etc. These, to say the least, are terms which have complex, difficult and varying meanings depending on the context or framework of facts in which they are used.⁴⁶ Furthermore, there is considerable controversy—assuming the terms can be given reasonably acceptable meanings—as to which type of "costs" should be used in determining which possesses the inherent low cost advantage as between different modes of transportation.⁴⁷

We respectfully suggest that the Commission's expertise in dealing with costs should be looked to in resolving

46. The complexities and difficulties in the use of the various cost terminology are evident from the discussion of the Court below (R. 248, 253, 254). The Appendix to the Court's opinion emphasizes this (R. 260-262). An examination of the Commission's Bureau of Accounts, Statement No. 4-54, entitled "Explanation of Rail Cost Finding Procedures and Principles Relating to the Use of Costs" (1954), a pamphlet of 250 pages, would provide further confirmation.

47. Typical of such controversy is the difference of opinion as to whether "fully distributed costs" should be used in determining the presence of a low cost advantage. Waterways Freight Bureau is an advocate of the use of "fully distributed costs". See its brief at 32-40. Distinguished economists, however, are of a different mind and advocate the use of "relevant incremental costs". See Baumol and Others, *The Rule of Cost in the Minimum Pricing of Railroad Services*, 35 U. of Chicago, J. of Bus. 1, 5, 9, 10 (1962).

such problems upon a case-to-case basis and upon records which it deems adequate. After such primary consideration by the Commission, court review to ascertain whether the Commission's conclusions are consistent with the law would, of course, be appropriate. To attempt to solve in a vacuum, or as an abstract proposition, the problem of how an inherent low cost advantage should be determined might create problems of greater severity than that being solved. Further, we suggest that the same thing applies with respect to the means by which, or the extent to which, an inherent low cost advantage should be protected.⁴⁸

VI

CONCLUSIONS AND RELIEF REQUESTED

For the reasons stated more fully above, it is most respectfully submitted that this Court should affirm the decision of the Court below which set aside the report and order of the Commission in *Commodities—Pan-Atlantic Steamship Corporation*, 313 I. C. C. 23 (1960) [R. 4-75] as unlawful under the terms of Section 15a(3) of the Interstate Commerce Act.

Respectfully submitted,

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48. This Court has indicated that cost determinations are peculiarly a matter for the expertise of the Commission. See *New York v. United States*, 331 U. S. 284, 326, 328, 335.

VII
PROOF OF SERVICE

I, Carl Helmetag, Jr., Attorney for the Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of February, 1963, I served copies of the foregoing Brief of the Appellee-Railroads on the several parties by mailing copies thereof in duly addressed envelopes, with postage prepaid, as follows:

1. On the Appellant, United States of America, copies to the Honorable Robert Kennedy, Attorney General of the United States, Department of Justice, Washington 25, D. C., the Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C., the Honorable Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C., and Robert C. Zampano, Esq., United States Attorney for the District of Connecticut, Federal Building, New Haven, Conn.

2. On the Appellant, Interstate Commerce Commission, copies to the Honorable Robert W. Ginnane, its General Counsel, and B. Franklin Taylor, Jr., Esq., its Associate General Counsel.

3. On the Appellant, Sea-Land Service, Inc., copies to its attorneys Warren Price, Jr., Esq., 1000 Vermont Avenue, N. W., Washington 5, D. C., Albert W. Cretella, Esq., 153 Court Street, New Haven 10, Conn., and William H. Armbricht, Jr., Esq., Merchants National Bank Building, Mobile, Ala. (air mail postage prepaid).

4. On the Appellant, Seatrains Lines, Inc., copies to its attorneys Ralph D. Ray, Esq. and Edmund E. Harvey, Esq., Chadbourne, Parke, Whiteside & Wolff, 25 Broadway, New York 4, N. Y., Morris Tyler, Esq., Gumbart, Corbin, Tyler

& Cooper, 205 Church Street, New Haven, Conn., and Warren E. Baker, Esq., Shoreham Building, Washington 5, D. C.

5. On the *amicus curiae*, Waterways Freight Bureau, copies to its attorney Samuel H. Moerman, Esq., Investment Building, Washington 5, D. C.

6. On the *amicus curiae*, American Trucking Associations, Inc. and National Motor Freight Traffic Association, Inc., copies to its attorneys Peter T. Beardsley, Esq., 1616 P Street, N. W., Washington, D. C., and Bryce Rea, Jr., Esq., Munsey Building, Washington 4, D. C.

7. On the *amicus curiae*, National Industrial Traffic League, copies to its attorney Dickson R. Loos, Esq., Munsey Building, Washington 4, D. C.

CARL HELMETAG, JR.

SUPREME COURT, U. S.

Nos. 108, 109, 110, 125

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JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

INTERSTATE COMMERCE COMMISSION, ET AL., *Appellants*

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, ET AL., *Appellees*

On Appeal From the United States District Court for the
District of Connecticut

**BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC
LEAGUE AS AMICUS CURIAE**

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**BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC
LEAGUE AS AMICUS CURIAE**

INTEREST OF AMICUS CURIAE

The National Industrial Traffic League (hereinafter referred to as the League) is a nationwide organization of shippers, both large and small, who utilize all forms of transportation including railroads, motor carriers, water carriers and air carriers. In addition to individual shippers the League membership includes Chambers of Commerce, Boards of Trade and similar commercial organizations which in turn have individ-

ual shipper members. The more than 1600 members of the League are drawn from all parts of the United States and include practically every line of industrial and commercial activity. The League is strictly a shipper organization. The League is not oriented toward any particular mode of transportation and its members use all modes.

Since being founded in 1907 the League on behalf of its membership has participated in many proceedings where issues of national transportation importance were involved before the courts, the Interstate Commerce Commission and other agencies in addition to presenting the League's views to legislative bodies.

By its constitution the League is dedicated to the promotion of sound conditions in transportation. Since the League represents those who are directly and individually engaged in the shipment and receipt of commodities by all forms of transportation, it represents that portion of the public with the most direct interest in a sound transportation system, the payers of the transportation charges in this country. Representing the shipping public most directly concerned with transportation, the League is, to a substantial extent, the voice of the consuming public in matters dealing with transportation.

The League believes there should be the greatest degree of responsibility upon, and freedom of, carrier management in providing the public with the transportation service which it needs. Regulation should be limited to that reasonably necessary in the public interest and should not encroach upon the proper sphere of managerial discretion and responsibility either in the field of traffic or actual physical operation.

It is the general position of the League that support should be given to proposals by carrier managements of new methods or techniques of rate-making which lend promise of improvement of the revenues, and of increasing or preserving the traffic of the carriers proposing them, with apparent benefits to the shipping public without creating destructive competition. While the League does not condone what could properly be described as rate wars and truly destructive competition, it believes that encouragement, to the greatest extent possible, of free and fair competition in transportation is in the public interest and is consonant with the applicable statutes and legislative intention of Congress as expressed in Section 15a(3) of the Interstate Commerce Act.¹

QUESTION PRESENTED

The question presented is whether the Interstate Commerce Commission can order the cancellation of otherwise lawful reduced rail rates merely to protect and preserve the traffic to a competing carrier by a different mode without specific findings adequately supported by substantial evidence the protected carrier possesses the inherent advantage of providing the low-cost mode of transportation.

ARGUMENT

The court below properly construed and applied the statutory language in Section 15a(3) of the Interstate Commerce Act in the light of the legislative history when it held that the Interstate Commerce Commission can not prevent a carrier from reducing its rates merely to preserve and protect the traffic of a compet-

¹ 49 U.S.C. 15a(3).

ing carrier where the Commission has not found, based on substantial evidence of record, that the carrier being protected possesses the inherent advantage of being the low cost mode of transportation and that the national defense requires the protected carrier's continued operation. The mere fact that the reduced rail TOFC rates could be expected to divert substantial traffic from the competing water carrier operation and thereby threaten its continued operations does not constitute an unlawful and destructive competitive practice under the applicable statutes. The Court below has properly decided that when the Commission sought to rely on the adverse effect the reduced rates would have on competition as justification for ordering the reduced rail TOFC rates cancelled, the Commission was "plainly holding up railroad rates 'to protect the traffic of another mode'", and this was "contrary to the specific prohibition of the 1958 amendment." (R. 247).

A. The Court Below Has Given Proper Effect to the Congressional Intention in Enacting Section 15a(3)

The salient fact that impresses itself after a review of the legislative history of Section 15a(3) is that its enactment was intended to encourage carrier competition. This congressional intention is clearly enunciated in the various committee reports and the floor debate of which the following excerpt is but one example:

"The committee wishes further to emphasize that the amendment in regard to section 5 amending section 15a of the act as framed by the committee is designed to encourage competition in transportation by allowing each form of transportation subject to the Interstate Commerce Act

full opportunity to make rates reflecting the inherent advantages each has to offer, with such rate-making being regulated by the Interstate Commerce Commission, however, to prevent "unfair or destructive competitive practices" as contemplated by the declaration of national transportation policy. Under the committee amendment the principal emphasis, but ~~not~~ the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies." (Emphasis added)

S. Rep. No. 1647, 85th Cong., 2d Sess. 3-4 (1958)

Congress presumably was not encouraging only *in-effective* competition. If the railroads were effectively to compete for the traffic involved in this proceeding it would mean that they must offer services at prices that will attract business. To say, as the Commission would have the Court say, that as soon as the competition is effective in attracting substantial traffic which another competitor needs to continue its current level of operations, the competition becomes destructive and therefore unlawful, is to make a mockery of the Congressional intent to encourage competition.

In the instant case the water carriers, following World War II, had developed their non-break-bulk Sea-Land operations which constituted an innovation and improvement in service over their previous break-bulk operation. The railroads sought only to compete effectively with this new Sea-Land service. The railroads also offered an improved service under their TOFC rates, but those rates were not published at levels lower than the Sea-Land rates. They were published at a parity. Any ability to attract substantial

traffic would be attributable to a better service being offered at a comparable price.

This was competition in ratemaking and transportation services to the benefit of the public as intended by Congress. This objective of the amendment was expressed by the Subcommittee On Surface Transportation of the Senate Committee On Interstate and Foreign Commerce in the following language which was later stressed by the entire Committee when quoted for emphasis in S. Rept. No. 1647, 85th Cong., 2d Sess. p. 3 (1958):

“The subcommittee anticipates that the broad effect of this amendment will be *to encourage competition between the different modes of transportation to the benefit of the shipping public.*” (Emphasis added)

In submitting the conference report for adoption by the Senate, Senator Smathers, Chairman of the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce expressed the views of Congress regarding the amendment to the rule of ratemaking:

“Mr. President, with respect to competitive ratemaking, the bills of both the Senate and the House had the same provisions. That was the provision which originated in the Senate, and the House included it in its bill. We did not change that in any respect whatever. Of course, we are very proud of the fact that not only the railroads but also the truckers, the water carriers, and everybody else agreed the rule of ratemaking could be changed without detriment to any one of them but that by putting the new criteria for ratemaking in the bill we are going to eliminate some of the pa-

ternalism which has heretofore existed in the minds of the Interstate Commerce Commission. *I think we will breathe into our whole system of transportation some new competition, which of course is needed, because the public and the consumer will benefit therefrom.*" (Emphasis added)

104 Cong. Rec. 15528 (1958). *

By ordering the reduced rail TOFC rates cancelled and requiring a differential to be maintained on the rail rates at levels above the corresponding Sea-land rates, the Commission was simultaneously not only protecting and preserving the traffic to Sea-land but was precluding and outlawing any *effective* competition by the railroads. The railroads were to be prevented from effectively competing so there would be no likelihood ~~the~~ railroads would attract substantial traffic under their new rates and services. This was to be done by the Commission without any findings, supported by substantial evidence, that the water carriers should be protected because they possessed the inherent advantage of being the low cost carrier and that the maintenance of their present level of operations was somehow required by the national defense. The Commission was, in fact, attempting to act as the "giant handicapper".²

The role assumed by the Commission of imposing differentials to assure the continued operations of carriers not found to have any inherent advantage to be protected in the interest of the national defense is directly contrary to the "new competition" mandated by Section 15a(3). Such a role is precisely the type of "paternalism" intended to be eliminated by the

² Brief of United States p. 38.

1958 amendment to the rule of ratemaking.³ Likewise, the Commission decision would, contrary to Congressional intention,⁴ directly prevent the forces of a new and free competition from working to the benefit of the shipping public in the form of new and improved services at reduced transportation charges.

The decision of the court below, on the issues before it, is consistent with and gives effect to the statutory language and the legislative intention behind the enactment of Section 15a(3) by reversing the Commission's attempt to protect and preserve a carrier's present level of operations from any effective competition. The decision of the lower court should be affirmed.

B. The Commission Order and Decision Should be Judged in Accordance With Its Expressed Findings

It is clear from the Commission's decision that the Commission was not attempting to protect any "inherent advantage of the water carrier as the low cost mode of transportation." The Commission admitted that, after a detailed analysis of the record before it, "we cannot determine on these records where the inherent advantages may lie as to any of the rates in issue." (R. 36-37) It is unwarranted speculation to guess how and on what grounds the Commission might act in a case where it is able and does determine what

³ *Supra* pp. 6-7; 104 Cong. Rec. 15528 (1958).

⁴ In addition to the previously quoted statement of Senator Smathers upon offering the conference report for the approval of the Senate, *supra* pp. 6-7, 104 Cong. Rec. 15528 (1958), there were statements in the legislative history evidencing the intent of Congress that Section 15a (3) was to encourage free competition for the benefit of the shipping public. Cf. 104 Cong. Rec. 12524, 12531.

mode does possess the inherent advantage of low-costs. On the present record which was before the court below there was no issue as to what mode possessed the inherent advantage of low costs. The Commission had clearly found it was unable to determine where the low-cost advantage lay. *A fortiori*, there was no issue as to whether the Commission had properly determined what is the proper method to be used in resolving which mode possesses the inherent advantage of low-costs.

Thus, since the issue was not properly before the court, the lower court's discussion of the use of so-called "fully distributed costs" to determine what is the low-cost mode is most properly designated *obiter dictum*. It is respectfully submitted that the proper method to be used by the Interstate Commerce Commission in resolving what mode possesses the inherent advantage of low cost is a matter to be decided, in the first instance, by the Commission on a record properly presenting adequate evidence on that issue.

It might be noted in passing that there is considerable dispute among economists and transportation experts as to the proper method for determining what is the low cost mode of transportation in a given case and as to the objective validity of so-called "fully distributed costs" and other criteria.⁵ The Commission presently has before it a proposed rulemaking proceeding Docket 34013, *Rules To Govern The Assembling And*

⁵ Cf. "The Role of Cost In The Minimum Pricing of Railroad Services," Baumol et al., 35 U. Chi. Bus. J. 357 (1962); "Arbitrary Formulas in Regulatory Proceedings," E.R. Jelsma, 12 Fed. Accountant 37 (1962). In its dictum the court below referred to "fully-distributed costs" as "a largely arbitrary estimate." (R. 253)

Presenting of Cost Evidence, in which the views of many experts and parties will be expressed as to the use and validity of many transportation costing methods. Sound judicial procedure requires that further discussion of the proper methods to be employed to determine what is the low-cost mode of transportation be left for a proceeding properly raising that issue.

The rule was stated by this Court in *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943):

“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”

After reviewing the evidence relating to the comparative costs of the different modes the Commission in its decision made it clear that the decision was not based upon a determination of which was the low cost mode. (R. 36-37.) Therefore, the Commission's discussion of so-called “fully distributed” and other costs did not form the grounds upon which its decision was based. Likewise, the discussion of such costs by the lower court was not related to the grounds upon which the Commission had acted. Since the discussion by the court below with respect to such costs did not relate to the grounds upon which the administrative action was based, that discussion is not in issue here as a part of the grounds upon which this Court is to judge the administrative order.

CONCLUSION

For the reasons stated above, the judgment of the district court setting aside and vacating the report and order of the Commission should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 109

SEA-LAND SERVICE, INC., Appellant

v.

**THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, ET AL., Appellees**

**On Appeal from the United States District Court for the
District of Connecticut**

**REPLY BRIEF FOR APPELLANT
SEA-LAND SERVICE, INC.,**

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REPLY BRIEF FOR APPELLANT
SEA-LAND SERVICE, INC.

STATEMENT

The point in controversy here is whether or not Section 15a(3) of the Interstate Commerce Act prohibits the Interstate Commerce Commission from declaring unlawful reduced railroad TOFC rates that it finds would threaten the extinction of what remains of the

deep water coastwise common carriers, which carriers are found to be efficiently operated and militarily and commercially essential to the nation's transportation system. The Commission, Sea-Land and Seatrain contend that Section 15a(3) does not preclude this action. The United States took the same position before the lower Court. In fact it not only joined in the Commission's brief before that Court but filed a supplemental memorandum in which it argued, among other things, (a) that the Commission did not abuse its discretion in concluding that the rail carriers had not shown their rates to be just and reasonable, since the latter failed to establish that they were the low cost mode; (b) that the Act forbids the Commission to allow the rate policy that the railroads have proposed, i.e. a policy of selective rate discrimination by a higher cost mode; (c) that measured even by anti-trust standards the railroads' discriminatory rate policy is unlawful since its necessary effect is to harm a competing mode; that although specific intent is necessary to sustain an anti-trust violation, intent may be inferred, as here. (Memorandum to lower Court pp. 8-13).

There is not at issue before this Court the questions of whether or not Sea-Land and Seatrain must in fact maintain rates lower than rail rates in order to compete; whether or not the rail rates at issue would in fact lead to the extinction of the coastwise water carrier industry;¹ or whether or not Sea-Land is the low

¹ In footnote at Brief pp. 24 and 25 appellees purport to show that the Domestic Merchant Marine has actually grown in size since before World War II. Of course, the vast majority of the vessels referred to as operating today are carriers of bulk traffic, principally petroleum, most of which are operated privately by oil companies. In 1960, according to the same source cited by appellees (Domestic Oceanborne and Great Lakes Commerce of the U.S.,

cost carrier vis-a-vis the rail TOFC services, at least insofar as the rates at issue are concerned. All of these questions have been answered by the Commission in the affirmative, and these findings were not disturbed by the lower court and have not been challenged in this Court.¹

ARGUMENT

I. Reply to the Appellee's Contention That the Commission's Condemnation of the Rail Rates at Issue is Inconsistent With Section 15a(3)

The arguments of the appellees, designed to place their own limited interpretation on the term "destructive competitive practices", and on the powers of the Commission to intercede in intermodal rate controversies, have been substantially disposed of in the opening briefs of appellants. We have shown that the legislative language that the appellees themselves urged

U.S. Dept. of Commerce, Maritime Administration, Page XfX) of the domestic cargo moving in the North Atlantic, South Atlantic and Gulf trades 124,304,297 short tons, or about 88 per cent, moved in tankers. The problem here is the preservation of common carrier, deep water dry cargo vessels. The fact remains that whereas there were 139 such vessels operating in the Atlantic Gulf—Coastwise trade in 1939, (R. 10) today there are 8—3 operated by Sea-Land and 5 by Seatrain.

¹ Neither is there involved the question of whether or not the appellee railroads sought to establish the reduced TOFC rates for the specific purpose of destroying Sea-Land or Seatrain—a purpose which disavowed by appellees at Page 5 of their brief. It should be noted, however, that as argued by the United States to the Court below specific intent is not a requisite to a finding of an anti-trust violation. In *Times-Picayune v. United States*, 345 U.S. 594, 614 this Court found that the contracts there involved "may yet be banned by § 1 (of the Sherman Act) if unreasonable restraint was either their object or effect." (emphasis added)

upon the Congress, and which would have accomplished that which they now contend was in fact accomplished, was unequivocally rejected. However, we are constrained to comment upon what appears to be an effort by the appellees to throw this proceeding out of perspective by minimizing the effect of the lower Court's opinion, while at the same time exaggerating the effect of the Commission's report, on future intermodal rate proceedings generally.

Appellees now seem to presume that the latter stands for the proposition that the Commission has virtually a free hand in condemning any rate reduction that would adversely affect any competing mode—be it motor carrier, inland waterway operator, or for that matter, freight forwarder. All of the appellees' arguments against the Commission's report avoid an integral part of the problem that was presented to the Commission and to the Court below, i.e. the fact that the competition aimed at by the TOFC rates at issue, and which would have been destroyed by such rates, was the competition of the *deep water coastal common carriers—found to be militarily and commercially essential—* not carriers of any other type. Thus in the factual background of the two District Court decisions cited by appellees (pp. 14-15) a highly important ingredient, necessary to make these decisions apposite, was missing. That is to say, *the carriers at which the reduced rail rates were there aimed were not deep water coastal carriers, nor was there a finding as to the military or economic essentiality of those carriers.*

The Commission's report below did not rest merely upon a finding that the rail TOFC rates at issue were destructively competitive because they would destroy another mode, and that the Congress intended that all

modes be preserved. Instead it went to great lengths to spell out why the *deep water coastal carriers*, threatened by the TOFC rates, are of specific and particular importance to the nation's welfare, both military and economic; why their protection from competition that would destroy them is in the public interest. Thus the Commission refers (R. 38) to "the importance of *coastwise shipping* for national defense purposes" as "emphasized repeatedly" by various Governmental sources (italics added), quoting one of those sources. Later it referred to a report by a Senate Committee devoted specifically to the *deep water domestic Merchant Marine* (R. 39). Finally, it quoted from its previous decision in *War Shipping Administration TA Application*, 261 I.C.C. 589, which referred to the particular economic importance of *coastal shipping*.

There is thus not here before the Court the question of how far the Commission may or may not go in proscribing rate reductions that would have the effect of forcing particular motor carriers, inland water carriers, or for that matter freight forwarders, out of business. Rather there is only the question of what the Commission may, or may not, do to forestall rate practices that will spell the demise of the deep water, coastwise common carrier industry. Appellee's apparent position that the decision in this proceeding will serve as a guide to the Commission in *all* future constructions of Section 15a(3) is without basis.

Beginning at Page 16 of their brief, appellees refer to certain legislative history as supporting their contention that Section 15a(3) indicates a Congressional intent to change substantially the "ground rules" covering intermodal rate making. The citations and

argument of the appellees to the contrary notwithstanding, we reiterate that the legislative history of Section 15a(3) firmly supports our contention that it was the intent of Congress that the Commission retain the power to exercise discretion in the adjudication of intermodal rate controversies, in the proper circumstances and on proper findings.

The appellees themselves urged to the Congress legislative language (the "three shall nots") that would have virtually stripped the Commission of discretion in intermodal rate controversies.¹ The enactment of this legislation was vigorously opposed by water carriers, motor carriers and the Commission.² Commissioner Freas of the Interstate Commerce Commission (then Chairman) suggested alternative language which would have directed the Commission to give due consideration to the "inherent cost and service advantages of the respective carriers." This suggestion was also rejected. Previously, the Secretary of Commerce had made a recommendation (not adopted) which would have eliminated the words "unfair or destructive practices" from the transportation policy. (H.R. 6141, 84th Cong. 2d Sess.) A later proposal of the Secretary of Commerce for the imposition of anti-trust standards, i.e. that the Commission might take into account the impact of a rate on competition "only where its effect might be substantially to lessen competition or tend to create a monopoly in the transportation industry or where the rate was established for the purpose of eliminating or injuring a competitor," also was not

¹ Hearings before the Sub-committee on Surface Transportation of the House Interstate and Foreign Commerce, 85th Cong. 1st Sess. April, 1957, at 5.

² 1956 hearings before House Sub-committee, pp. 1767-1771.

adopted.¹ A Senate Commerce sub-committee recommended the enactment of language in Section 15a(3) which would have instructed the Commission, in determining whether a rail rate is lower than a reasonable minimum rate, to "consider the facts and circumstances attending the movement of the traffic by railroads and not by such other modes." (S. Rep. 1647, 85th Cong. 2d Sess.) This recommendation also was rejected.

Had the Congress intended virtually to deprive the Commission of all discretion in the adjudication of intermodal rate controversies—to have relegated it to the role of a "computer of costs"—it obviously would have done so by legislation similar to the "three shall nots." In rejecting this and like proposals, responsive to the strenuous objection of the water carriers, and the motor carriers, as well as the Commission itself, Congress made it clear that the railroad-sought license to indulge in rate making practices without regard to the effect upon competing modes was being unmistakably denied. The Congress made it clear that the national transportation policy is not "dead" legislation, without current meaning and effect. Destructive competition, specifically proscribed in the policy, was recognized by the Congress as a force fully as evil as when the policy was enacted 18 years before.

The interpretation of Section 15a(3) contended for by the appellees is in error.

¹ Hearings on Problems of the Railroads before the Sub-committees on Surface Transportation of the Senate Interstate and Foreign Commerce Committee, 85th Cong. 2d Sess., p. 2353.

II. Reply to the Appellee's Argument That the National Transportation Policy Does Not Empower the Commission to "Deviate from the Basic Scheme of Economic Regulation" in Order to Preserve Carriers Under Any Circumstances

The United States, while appearing to agree with the lower Court's basic philosophy, concedes that if what it considers adequate findings were made as to the national defense or economic essentiality of the Domestic Merchant Marine the Commission could go beyond what otherwise are considered by it to be the borders of its statutory authority. (United States brief, pp. 44, 46, 48). The appellees, however, contend that under no circumstances could national defense considerations cause any relaxation of what they conceive to be the present statutory standard (pp. 26-28). Thus the appellees would accord the Commission no leeway, flexibility or discretion in adjudicating intermodal rate controversies; the "national defense" provision of the national transportation policy would be, as far as the appellees are concerned, a pious platitude without practical significance. To this end they have seized upon the novel interpretation by the lower Court of the national defense aspect of this proceeding, i.e. that a transportation system adequate for the nation's defense is a "hoped for end" of the national transportation policy—not an "operative policy or means" (R. 256).

In *United States v. Capital Transit Company*, 325 U.S. 357, involving the reasonableness of bus fares paid by army and navy employees, this Court said:

"Congress unequivocally reserved to the Commission power to regulate reasonableness of interstate rates in the light of the needs of national defense" (p. 362).

Clearly the "national defense" is not merely a "hoped for" end of the national transportation policy,

but is rather *one of the specific ultimate objectives of that Policy, and of the Act itself*. Rather than being subordinate to the other provisions of the Act, the converse is true. Thus if there were indeed a conflict here between Section 15a(3) and the national defense provision of the policy (which we deny), the former must give way to the broader purposes of the latter.

Can it be seriously questioned that deep water carriers, particularly of the more flexible and efficient containership type, are of significant—even unique—value to the nation's defense in times of emergency? At the outset of World War II all of the deep water domestic dry cargo vessels were promptly taken over by the Government for military purposes. The vessels of both Sea-Land (Pan Atlantic) and Seatrain played important roles in the war effort, a number of Sea-Land's vessels being lost in enemy action. The military importance of vessels of the domestic fleet is substantially greater than that of vessels engaged in foreign commerce for the practical reason that they are at all times available and can immediately be put into service when the need arises.¹ Would anything have been added

¹ See document submitted to Senator Butler by Vice Admiral John Sylvester, Deputy Chief of Naval Operations (Logistics) dated March 10, 1961 entitled "Ocean Shipping to Support the Defenses of the United States", Department of the Navy (1961) at 107 Cong. Rec. 7299-7302 (1961), in which the importance of the domestic deep water fleet because of its ready availability in time of emergency, and the added importance of vessels "adapted for rapid cargo handling," and "uniquely fitted to act as a link between our coastal cities during the period of likely disruption of land transportation", giving them an increased value in the event of a major nuclear war, was emphasized (pp. 7300, 7301).

See also, testimony of Vice Adm. Ralph E. Wilson, Hearings before Merchant Marine & Fisheries Subcommittee of Senate Commerce Committee on "Decline of Coastwise and Intercostal Ship-

to the record in the proceeding before the Commission if military personnel had testified to these obvious facts; or would the Commission's report have been strengthened if it had made reference thereto, in addition to its references to Maritime Administration and Congressional Committee expressions of the military importance of domestic shipping? We think not.

We reiterate that judicial construction of Section 15a(3), and indeed all of the sections of the Act, should begin with, and be in the light of, consideration of the ultimate and over-all aims of the Act, one of which is the "developing, coordinating and preserving (of) a national transportation system, by water, highway and rail as well as other means adequate to meet the needs of the commerce of the United States, of the Postal service, and of the national defense." In holding that the preservation of domestic deep water carriers as necessary instruments of national defense is a goal subordinate to other provisions of the Act, the appellees and the Court below err.

ping Industry". 86th Congress 2nd Sess. (1960) pp. 105-106, to the same effect.

See also President Kennedy's special message to Congress on regulatory agencies, on April 13, 1961, in which he stated that "it is disturbing * * * to note that, for example, our *common carrier inland waterway traffic*, our Great Lakes traffic, our *intercoastal and coastal traffic* have been withering away, at a pace far more rapid than appears desirable in the light of the low cost nature of this method of transportation *and its potential role in the event of war*. R. H. Doe. No. 135 87th Cong. 1st Sess. (1961), reprinted at 107 Congressional Record 5814 (1961). (emphasis added)

III. Reply to the Appellees' Argument That the Effect of the Opinion Below Is Not to Make Relative Cost the Controlling Consideration in Intermodal Rate Controversies

Perhaps fearful of the consequences to themselves of a "relative cost" standard in intermodal rate adjudication, the appellees profess not to read in the lower Court's opinion an espousal of that standard. Although we would like to agree, we cannot. Throughout the opinion there are repeated references to the "inherent advantage" provision of the national transportation policy (R. 248, 250, 252) and to "low cost mode" (R. 255, 256, 258, 259). The Court's view that relative costs were of "critical" importance (R. 252) was at the heart of its construction of Section 15a(3); hence was the reason why it disagreed with the Commission's view that under the circumstances here, relative cost was not controlling. Much as the appellees may wish to dismiss as dicta the Court's expressions of approval of "relative cost" as the controlling standard, their efforts to this end are unpersuasive.

The practical reasons why the application of relative cost standards as controlling in intermodal rate making would not only be unworkable but wholly inimical to the nation's transportation system were readily apparent to the Commission, and should have been equally apparent to the lower Court. Transportation cost finding is a complex, and at best an inexact, science, as this Court recognized in *New York v. United States*, 331 U.S. 284.¹ Moreover, the end re-

¹ "The appraisal of cost figures is itself a task for experts, since these costs involve many estimates and assumptions and, unlike a problem in calculus, cannot be proved right or wrong. They are, indeed, only guides to judgment. Their weight and significance require expert appraisal.

The Commission has concluded that while cost studies are highly

sults of "cost studies" are premised upon factors of a variable and continually shifting nature. The railroad cost of transporting commodity A from X to Y in any given period will depend upon factors such as average load of commodity A, as well as all commodities; the extent of equipment utilization on return hauls; the type of rail cars used. The cost of a water carrier movement from point X to point Y will depend upon factors such as the gateway ports served at the time, the costs

relevant to these rate problems they are not conclusive. It said in this case:

'Discretion and flexibility of judgment within reasonable limits have always attended the use of costs in the making of rates. Costs alone do not determine the maximum limits of rates. Neither do they control the contours of rate scales. Other factors along with costs must be considered and given due weight in these aspects of rate making.' 262 I.C.C. p. 693". (328)

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"These problems of transportation economics are complicated and involved. For example, the determination of transportation costs and their allocation among various types of traffic is not a mere mathematical exercise. Like other problems in cost accounting, it involves the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitiated.³³ Moreover, the impact of a particular order on revenues and the ability of the enterprise to thrive under it are matters for judgment on the part of those who know the conditions which create the revenues and the flexibility of managerial controls." (335)

³³ See Hamilton, *Cost as a Standard for Price*, 4 *Law & Contemp. Prob.* 321, 329:

"Now and then a hardy soul, equipped with simple faith and a calculating machine, essays the adventure of rates based upon the true costs of particular services. The feat is, of course, technically impossible, for value judgments or empirical rules are essential to the distribution of overhead. A calculation of the real cost of transporting cotton-seed in less than earload lots from Lampassas, Texas to Kankakee, Illinois, is a stubborn exercise in imputation." (emphasis added)

of connecting motor carriers, the age and value of the vessels in use, and the degree of utilization of the load capacity of the vessels. Any material change in any of these railroad or water carrier factors will materially alter the respective costs. In its report below the Commission specifically commented upon the practical difficulties of relative intermodal cost finding, noting that the rail T.O.F.C. costs of handling the traffic under consideration would depend upon the type equipment used (i.e. one or two trailer flatcars); that the Sea-Land costs would depend upon what ports were served (R, 36).¹

In these circumstances the practical unfeasibility of predicated a relative rate structure solely, or mainly, with regard to relative cost is quite apparent, as is the impracticability of fixing the measure of differentials on the precise basis of the difference in costs, as now suggested by the United States. In a given period one carrier or carrier mode may under recognized cost finding procedures be found to be low cost; in a different period a competing carrier or carrier mode may be low cost.

We submit that in enacting Sec. 15a(3) the Congress may not be presumed to have invoked a hard and fast system of rate making, the implementation of which would inevitably produce widespread rate instability and uncertainty, to say nothing of gross inequities between the carrier modes and shippers. Certainly the deep water domestic water carrier industry, especially in its present marginal status, would not be able to survive even a short period of such rate instability and uncertainty.

¹ "Relative costs" rates would also inevitably produce countless violations of Sections 2 (discrimination), 3 (preference and prejudice) and 4 (long and short haul) of the Interstate Commerce Act.

IV. Reply to Brief of the National Industrial Traffic League as Amicus Curiae

The National Industrial Traffic League is an association composed entirely of shippers or shipper organizations (N.I.T.L. brief, pp. 1, 2). Traditionally, a principal preoccupation of shipper organizations such as this is in the securing of reductions in freight rates. Frequently, as here, they adopt the short range viewpoint and contend for a course of action that will result in immediate rate reductions, without consideration to the long range effect on the nation's common carriers. The League is indeed naïve if it does not recognize the fact that once the deep water common carriers have been removed from the national scene by the selective rate cutting of the railroads, the latter's rates between coastal areas will promptly be restored to the same basis as applied between inland points—a course of action not prevented by Sec. 4(2), contrary to the lower court's finding. See *Skinner v. Eddy*, 249 U.S. 557, 568. That this has been the history of railroad practices is well known to all students of transportation, as reflected for example in the debates leading to the enactment of the 1958 act.¹

MR. KEFAUVER: We know that in the past some efforts were made by some carriers to reduce their rates on a part of a system where they were competing with a water carrier, with the point in mind of almost eliminating the competition of the water carrier. It was alleged that this might be done in order to get the water carrier out of business, and then raise rates later, and also making up the losses on some other parts of the system. I am sure that this is not being contemplated under the language of the provision we have been discussing, or that that is the intention of the language." (104 Cong. Rec. 10859)

As stated by Congressman Esch of the House Committee on Interstate and Foreign Commerce, relative to the impending addition of the minimum rate power in the Transportation Act of 1920:

"You know the story—you can read it upon every mile of every inland waterway of the United States—how the water

The N.I.T. League has taken no part in this proceeding heretofore. We urge that its belated appearance on the scene in behalf of the railroads be not construed as any indication of substantial shipper disinterest in the preservation of deep water common carriers. The widespread support of these services over the years by shippers in or near coastal areas, as reflected in part by their testimony in numerous Commission reports dealing with applications for operating authority,¹ should serve to dispel any notion that the shipping public has no material stake in continued coastwise common carrier services.

CONCLUSION

The contentions of the Appellges and the National Industrial Traffic League are without merit, and should be rejected.

Respectfully submitted,

WARREN PRICE, JR.

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Sea-Land Service, Inc.*

carrier started, and then the rail carrier paralleled the river bank and made a rate so low that the water carrier had to abandon its line and its route; and after such abandonment the rail carrier raised the rate and the public was no better off and was, in fact, worse off than before." 58 Cong. Rec. 8317, Nov. 11, 1919.

¹ As for example in *Pan-Atlantic SS Corp. Extension—Baltimore*, 265 I.C.C. 215, 217-25; *Newter SS Corp. Extension—Philadelphia*, 265 I.C.C. 281, 283; *Waterman SS Corp. Extension—California Eastbound*, 285 I.C.C. 9, 12; *Isbrandtsen Co., Inc., Common Carrier Application*, 285 I.C.C. 369, 374; *West Coast Transoceanic SS Line Com. Car Application*, 285 I.C.C. 381, 395.

Proof of Service

I, Warren Price, Jr., attorney for Sea-Land Service, Inc., appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25th day of February, 1963, I served copies of the foregoing Reply Brief for Appellant Sea-Land Service, Inc. on the several parties hereto as follows:

1. On the United States, by mailing copies, in duly addressed envelopes, with first class postage prepaid, to Robert C. Zampano, Esq., United States Attorney for the District of Connecticut, Federal Building, New Haven, Connecticut; to Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C.; to Honorable Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C.; and to Joel E. Hoffman, Esq., Antitrust Division, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies, in duly addressed envelopes, with first class postage prepaid to Robert W. Ginnane, Esq., General Counsel, Interstate Commerce Commission, Washington 25, D. C.; and to B. Franklin Taylor, Jr., Esq., Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On the Appellees herein, by mailing copies in duly addressed envelopes, with first class postage prepaid to their counsel of record as follows: Eugene Hunt, Esq., and Thomas P. Hackett, Esq., 54 Meadow Street, New Haven 6, Connecticut; Carl Helmetag, Jr., Esq., 1138 Transportation Center, Six Penn Center Plaza, Philadelphia 4, Pennsylvania.

4. On the Appellant in No. 110, Seatrain Lines, Inc., by mailing copies in duly addressed envelopes with

first class postage prepaid, to its counsel of record as follows: Alan S. Fuller, Esq., and Ralph D. Ray, Esq., Chadbourne, Parke, Whiteside & Wolff, 25 Broadway, New York 4, N. Y.; Gambart, Corbin, Tyler & Cooper, 205 Church Street, New Haven, Connecticut.

5. On *amicus curiae* Waterways Freight Bureau by mailing copy in duly addressed envelope, with first class postage prepaid to Samuel H. Moerman, Esquire, 743 Investment Building, Washington 5, D. C.

6. To *amicus curiae* The National Industrial Traffic League by mailing copy in duly addressed envelope with first class postage prepaid to John F. Donelan, Esquire, 707 Munsey Building, Washington 4, D. C.

7. To *amici curiae* American Trucking Associations, Inc., and National Motor Freight Traffic Association, Inc., by mailing copy in duly addressed envelope, with first class postage prepaid to Peter T. Beardsley, 1616 P Street, N. W., Washington, D. C. and Bryce Rea, Jr., Esquire, 1616 P Street, N. W., Washington, D. C.

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